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THE LAW

RELATING TO

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AND
CONDITIONS OF SALE
ON A SALE OF LAND.

BY

WILLIAM FREDERICK WEBSTER, M.A.,

OF LINCOLN'S INN, ESQ., BARRISTER-AT-LAW;

LATE WHEWELL SCHOLAR IN THE UNIVERSITY OF CAMBRIDGE.

LONDON:

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PREFACE.

AN apology is needed for the publication of a book which seems to enter into competition with the well-known treatises of Lord St. Leonards and Mr. Dart on "Vendors and Purchasers." My justification for venturing upon such classical ground is that the limited scope of my Book has enabled me to enter into more detail, and to make a more systematic arrangement of the subject-matter. I have not written a treatise on the whole Law of Vendor and Purchaser, nor have I devoted any part of the Book to the general law of capacity to contract and the validity of contracts, or to the discussion of points of real property law. Part I. of the Book treats of the relation of Vendor and Purchaser from the standpoint of the vendor's duty in preparing the particulars, and of the purchaser's remedies for the vendor's misdescription; and Part II. discusses each separate matter dealt with in the usual conditions of sale.

My indebtedness to the last edition of Mr. Dart's treatise, both as a guide to the authorities and as an expositor of the law, requires to be acknowledged here. There are very few reported decisions which I have been able to unearth which are not mentioned in Mr. Dart's

book, and are at the same time worth mentioning. My chief additions, as regards the substance of the law, are derived from decisions, of which only a portion is mentioned in the existing text-books—apparently because that portion alone appears in the head-notes of the reports. But I have carefully searched the records for points not appearing or likely to appear in the decisions, more particularly the working out of an order for compensation. It may be added that the references to the records in this Book are few compared with the decrees, orders, master's reports, &c. which I have inspected.

I have tried, as far as possible, to avoid a too general fault in legal text-books,—that of citing several authorities for each proposition of law. This practice reaches its fullest development in treatises which have been re-edited several times. In such books, not only are authorities unnecessarily accumulated, but criticisms on former authorities are relegated to a foot-note, where it is not at all uncommon to read, after a citation of, say, *Jones v. Smith*, the words “but see and distinguish *Brown v. Robinson*.” An editor who performs his work in this spirit, has, it seems to me, attained the *ultima Thule* of editorial self-effacement. It is surely the duty of the text-writer or editor himself to “see and distinguish” *Brown v. Robinson*, and not to leave this sometimes troublesome and difficult business to his reader, who, perhaps, is working against time, and can ill afford to spend two minutes in looking up an unnecessary reference.

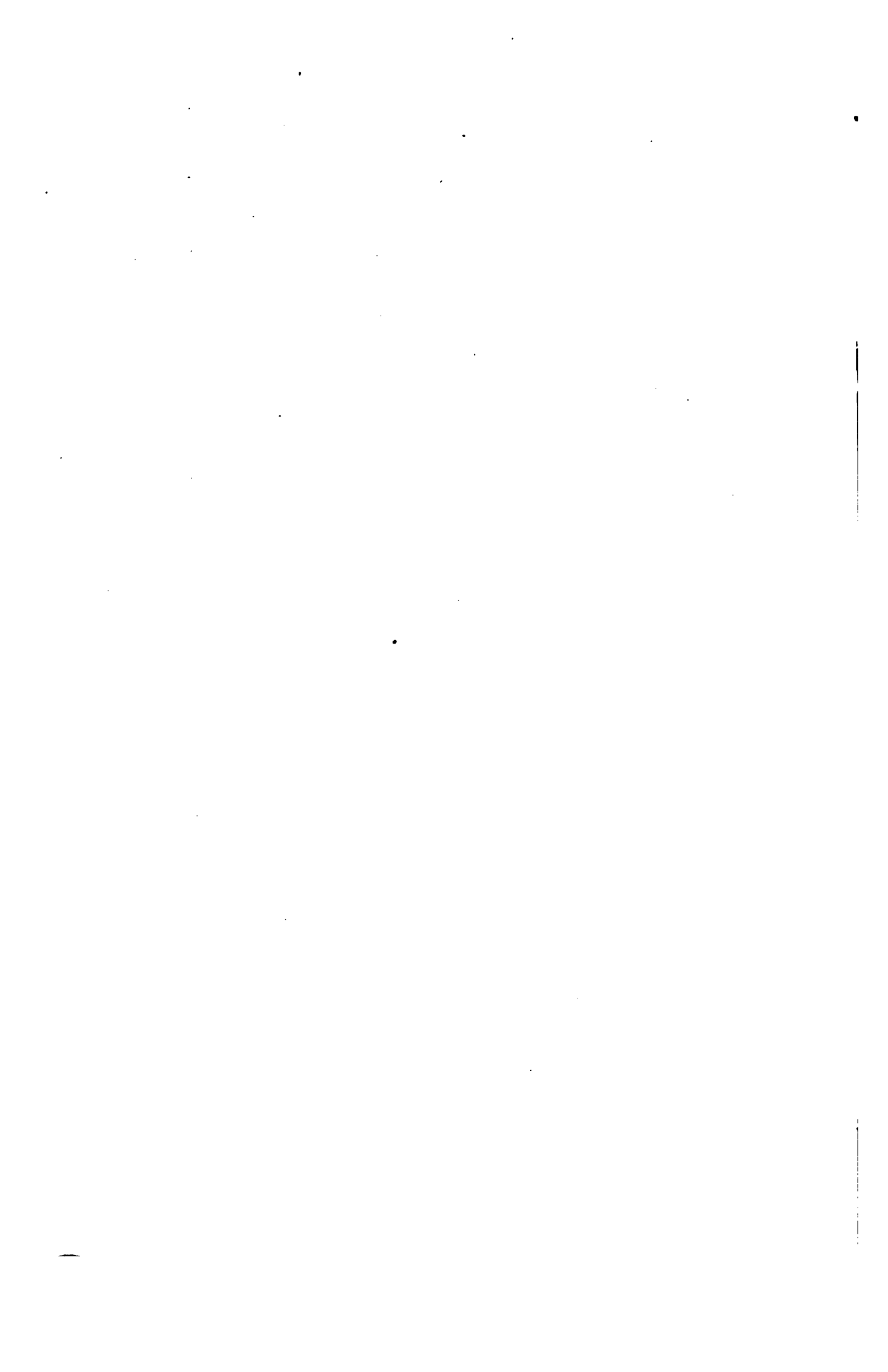
The cases are brought down to the following pages in the several reports:—in the Law Reports, down to

40 Ch. D. p. 384, 20 Q. B. D. p. 393, and the end of 13 App. Ca.; in the Irish Law Reports, down to Vol. 21, p. 583, and Vol. 22, p. 673; and down to 58 L. J. Ch. 184, 58 L. J. Q. B. 160, 60 L. T. N. S. 64, and 37 W. R. 352. The decisions in the Court of Appeal are, in the case of the Law Reports, distinguished as "Ch. Div." and "Q. B. Div."; those in the Court below being "Ch. D." and "Q. B. D." respectively.

My thanks are due to Mr. D. M. ROBERTSON-MACDONALD and Mr. J. E. H. BENN, both of the Equity Bar, for help in the revision of the proofs and compilation of the Index.

W. F. W.

3, STONE BUILDINGS, LINCOLN'S INN,
March, 1889.



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PARTICULARS AND CONDITIONS OF SALE.

ERRATA.

Page 304, line 12 from top, for "purchaser" read "vendor."

„ 443, "Reversion, prior sale of," &c., for 272, 274, read 198.

describe the property accurately, and in unambiguous language, to make no mistakes concerning it, and to mention any latent defects in it, or any incumbrances affecting it which he does not intend to pay off. Neglect of this duty may be called briefly "misdescription." See Chap. I. pp. 9—17.

If the purchaser is induced (Art. 18) through the vendor's misdescription (Art. 20) to buy property which he would not otherwise have bought, or to give a higher price than he would otherwise have given, he is, subject to the law as to notice (Art. 19), entitled to relief as mentioned in Arts. 23—27.

ART. 2. If the vendor be a trustee, he has a twofold duty to perform; not only must he, as must an ordinary vendor, describe the property correctly so as not to deceive the purchaser, but his description should also be accurate in the interests of

his *cestui que trust*. He must not omit any matter enhancing the value, or insert unnecessarily anything disparaging. See Part II. Chap. XVI.

ART. 3. If the vendor intends to reserve any easements over the land, or rights inconsistent with the full enjoyment thereof, he must express his intention in clear and explicit language. See Chap. I. p. 15.

ART. 4. If the particulars or conditions contain any undertaking on the part of the vendor, the purchaser will be entitled to specific performance of such undertaking, if possible; if not, to the relief mentioned in Arts. 23—27. See Chap. I. p. 15.

ART. 5. If the property be correctly described in the particulars, but the vendor afterwards alters the property so as to make the description incorrect, the purchaser will be entitled to the same relief as if the vendor had misdescribed the property: p. 16.

ART. 6. If the description given in the particulars, though false at the date of the sale, is made true by an alteration in the property before the date fixed for completion, there is no misdescription: p. 16.

ART. 7. Where the description is the usual and proper designation of the property, the purchaser cannot complain, even if he is deceived by such description: p. 17.

ART. 8. Where it is clear that a literal interpretation of a description in the particulars would contravene a general rule of law or universal custom, and the description is capable of a modified interpretation or limited application which would make it true, the purchaser cannot complain that he was deceived by such description: p. 17.

ART. 9. Misdescription is of three sorts:—(1) positive misdescription or “misrepresentation”; (2) negative misdescription or “omission”; (3) ambiguity.

ART. 10. Misrepresentation is the statement that a fact or state of things exists, or that the property sold is of a certain nature or quality, when the contrary is the case. A statement though capable of an interpretation which would make it true will be treated as a misrepresentation—(i) if, under all the circumstances, it is equivalent to an active misstatement of fact, as, for instance, where the particulars contain such minute information as to certain defects as to imply the non-existence of other defects of the same kind; (ii) if the statement is capable of two interpretations, and the interpretation which would make the statement true is one which would not be likely to occur to a person of ordinary sense exercising ordinary care. The silence of the vendor may, under certain circumstances, amount to misrepresentation. See Chap. II. pp. 18—23.

ART. 11. Misrepresentation, in order to entitle the purchaser to relief, must be misrepresentation of fact. Misrepresentation of a matter of opinion or of law is not enough. See pp. 23—30.

ART. 12. The vendor may use laudatory epithets for the purpose of puffing the property, or make statements as to its value, or as to probable profits, chances, risks, or other matters of opinion; and though the Court may consider such epithets and statements of opinion not to be justified by the facts, yet if the statement involve no misrepresentation of a specific fact the purchaser will not be entitled to relief. See Chap. II. pp. 23—28.

ART. 13. A representation of intention, if true at the time it is made, is not falsified by an alteration of that intention. A misrepresentation of intention is a misrepresentation of fact. A representation of the vendor's intention may be equivalent to an undertaking or contract. See Chap. II. pp. 30—34.

ART. 14. Omission is the neglect of the vendor to mention defects, incumbrances, or damaging facts, which the vendor ought to mention. The vendor ought to mention all matters affecting the value of the property except the following :—

(a) Patent defects. A patent defect is a defect in the physical

condition of the property which a purchaser would be likely to discover if he inspected the property with ordinary care. A latent defect is one which a purchaser inspecting the property with ordinary care would not be likely to discover.

(b) Defects to which land usually is subject.

(c) Defects necessarily or usually inherent in land of the same tenure as that which is being sold.

(d) Local and public Acts affecting the property.

(e) Usual and well-known customs as to the rights of tenants or mining rights.

(f) The result of a recent valuation of the property, or of a previous attempt to sell. See Chap. III. pp. 35—42.

ART. 15. If the vendor industriously conceals a patent defect, or makes a misrepresentation concerning that or any other matter which he is not bound to disclose, the purchaser will be relieved. See Chap. IV. pp. 43—45.

ART. 16. An ambiguity is a statement which is literally true, but which is susceptible of another meaning, which latter meaning might easily occur to a person of ordinary sense exercising ordinary care. If the meaning which would make the statement true is one which would not be likely to occur to a person of ordinary sense exercising ordinary care as a possible meaning, the statement is more than an ambiguity, it is a misrepresentation. See Art. 10. If the other or untrue meaning is one not likely to occur to a person of ordinary sense exercising ordinary care, then the fact that the statement is capable of being misconstrued by an extraordinarily stupid or careless person does not make it an ambiguity. If the purchaser complains of an ambiguity, he must tell the Court in what sense he understood it. See Chap. V. pp. 46—48.

ART. 17. In the case of a mistake caused by an ambiguity, the purchaser will not be entitled to relief if the particulars or conditions contain some other statement from which the purchaser could have inferred the truth: p. 48. And see Art. 19.

ART. 18. The purchaser cannot complain of a misdescription if he was not deceived by it, or if he was not induced by it either to purchase something which he would not otherwise have purchased, or to give a higher price than he would have given had he not been deceived. See Chap. VI. pp. 49—63.

ART. 19. In the absence of any active misrepresentation, the purchaser cannot complain that he was misled where he is fixed with notice of the true state of facts. The purchaser is held to be fixed with notice—(1) of all patent defects (see Art. 14); (2) of all facts stated in the particulars, or in the plan if incorporated with the agreement for sale, or referred to, and a reasonable opportunity for inspection offered; (3) of the contents of a lease or other document to which the particulars refer the purchaser for notice, provided reasonable opportunity for inspection is offered. See Chap. VII. pp. 64—73.

An active misrepresentation by the vendor excludes notice. Chap. II. pp. 19—23.

ART. 20. Except in cases of “common mistake” and great hardship the purchaser will not be entitled to relief on the ground of a mistake made by himself and not caused by the vendor. Common mistake is a mistake of fact common to both parties and of such a nature that to enforce the contract would inflict very great hardship on one of the parties. See Chap. VIII. pp. 74—81.

ART. 21. The purchaser is entitled to relief (see Arts. 23—27), whether the misdescription was innocent or fraudulent. But a fraudulent misdescription will entitle a purchaser—(a) to relief after completion; (b) to damages for loss of bargain where an innocent misdescription would only have entitled him to recover expenses actually incurred; and (c) to rescind in cases where an innocent misdescription might only have entitled him to demand compensation. See Chap. IX. pp. 82—89.

A fraudulent misdescription is a false statement made by a person knowing it to be false, or not caring whether it be true or false, or believing it to be true without having reasonable ground for such belief.

ART. 22. An innocent misrepresentation made by the auctioneer or other person employed by the vendor as his agent to sell the property will, if made in the ordinary course of business as auctioneer or agent for sale, have the same effect on the rights of the vendor and purchaser as an innocent misrepresentation made by the vendor himself.

If the vendor authorize his agent to make a representation which the vendor knows to be untrue, the vendor is guilty of fraud.

If the vendor knowingly and purposely refer the purchaser to an ignorant agent for information, the vendor is liable as for fraud if the agent makes any misrepresentation.

If the vendor knows that his agent has made a misrepresentation, and does not correct it, the vendor will (probably) be liable for fraud.

If a fraudulent misrepresentation tending to the benefit of the vendor has been made by the agent in the course of business and acting within the limits of the authority ordinarily given to an agent for sale, the vendor is liable as for fraud. See Chap. X. pp. 90—93.

ART. 23. The purchaser can, if he asks for relief before the conveyance is executed, compel the vendor to make good any errors or representations contained in the written contract if it be possible for the vendor to do so, unless this would lead to a breach of trust, or contravene some express enactment, or be prejudicial to the interests of third persons in the property sold, or would inflict great hardship on the vendor. See Chap. XIII. p. 99.

ART. 24. If the vendor cannot or if the Court refuses to compel the vendor to make good the error or representation, then, in the absence of any previous agreement between the parties as to compensation, the rights of the vendor and purchaser, in case the application for relief is made before the conveyance is executed, are as follows:—

(i) The Court will, at the desire of the purchaser, rescind the contract if the error or representation was in an essential

matter, although the vendor would prefer to complete, giving compensation. See Chap. XIV. pp. 102—118.

(ii) The Court will, at the desire of the vendor, decree partial performance with compensation if the error or representation was in a non-essential matter, and was not made fraudulently [and if compensation can be fairly assessed], although the purchaser would prefer to abandon the contract. See pp. 131—154.

(iii) The Court will, at the desire of the purchaser, decree partial performance with compensation, although the error or misrepresentation was in a matter which would usually be regarded as essential, and even though the vendor would prefer to abandon the contract, provided that the error or representation was contained in the written contract, and that compensation can be fairly assessed. See pp. 131—154.

(iv) If compensation is refused on the ground that it cannot be fairly assessed, the purchaser may rescind [or at his option accept an indemnity, p. 155]. If the Court refuses to decree either compensation or an indemnity, the purchaser is entitled to have the contract completed as far as the vendor can complete it.

An “essential” error or representation is one whereby the purchaser was induced to purchase something which but for such error or representation he would never have purchased at all.

A “non-essential” error or representation is one the only effect of which was to induce the purchaser to give a higher price than he would otherwise have given.

ART. 25. Where the purchaser is entitled to rescind the contract he is also, in the absence of stipulation, entitled to recover his deposit with interest at 4/ per cent., and also, by way of damages, the expenses of and incidental to the sale properly incurred by the purchaser. If the vendor has been guilty of fraud or wilfully refuses to complete, the purchaser will be entitled to damages for the loss of his bargain. See Chaps. XV. and XVI. pp. 119—130.

ART. 26. After the conveyance has been executed the pur-

chaser will not be entitled to relief other than that which he may obtain under the covenants for title or the condition for compensation, except in the following cases:—(1) Where there are incumbrances which have been created by the vendor himself or are covered by the covenants for title the purchaser may have them paid out of the unpaid purchase-money; (2) where the vendor has been guilty of fraud, or a “common mistake” has been made (see Art. 20), the execution of the conveyance does not bar the purchaser’s right to relief. See Chap. XX. pp. 158—160.

ART. 27. If the error or representation is not contained in the written contract, then—

(i) The vendor cannot enforce specific performance of the contract without making good the error or representation, or giving compensation therefor. If the error or representation be essential, or if the vendor made it fraudulently, the vendor cannot enforce partial performance even with compensation.

(ii) The purchaser cannot enforce partial performance with compensation.

(iii) If the error or representation be essential, the purchaser may rescind and obtain the ancillary relief mentioned in Art. 25. See Chap. XXI. pp. 161—169.

CHAPTER I.

MISDESCRIPTION.

ON a sale of land, it is the duty of the vendor to describe the property accurately and in unambiguous language, to make no misstatements concerning it, and to mention any latent defects in it, or any incumbrances affecting it which he does not intend to pay off. Neglect of this duty may be called briefly misdescription. Duty of vendor.

If the vendor be a trustee he has a twofold duty to perform; Trustee. not only must he, as an ordinary vendor must, describe the property correctly, so as not to deceive the purchaser, but his description should also be accurate in the interests of his *cestui que trust*. He must not omit any matter enhancing the value or insert unnecessarily anything disparaging. See further as to this, Chap. XXXVII. on Depreciatory Conditions, p. 358.

The following are some instances of misdescription, but many more will be found in Chap. XIV. pp. 105—117 :— Examples of misdescription.

Four undivided sevenths of seven acres described as “four acres”: *Arnold v. Arnold*, 14 Ch. Div. 270.

Redeemed land tax, consisting of several sums charged on separate parts of the property, described as an aggregate amount charged on the whole property: *Cox v. Corenton*, 8 Jur. N. S. 1142.

Leaseholds described as being sold “by order of the executors,” which were in fact being sold by the administrator *de bonis non* of the testator, with the will annexed, *durante absentia* of his next of kin: *Webb v. Kirby*, 7 D. M. & G. 376 (in effect reversing *Stuart*, V.-C., 3 Sm. & G. 333).

A sum in gross, which was paid for the right to use land as a

pleasure-ground or garden, described as a "freehold ground-rent": *Evans v. Robins*, 31 L. J. Ex. 465.

Land described in the particulars as "a valuable tavern lot," where the vendor was bound by a covenant prohibiting user otherwise than as a private dwelling-house or shop, and by a covenant not to commit a nuisance on the property: *Coombs v. Cook*, 1 Cab. & Ell. 75.

"Free public house," where the lease contained covenants to take beer from the lessor: *Jones v. Edney*, 3 Camp. 285; *Modlen v. Snorball*, 29 Beav. 641.

The description "public house," where there was only an off-licence (probably, see *Pease v. Coats*, 2 Eq. 688, a case on the construction of a covenant).

An agreement, made at the instance of the lessees, to grant a lease of a seam of coal "called the S. vein, and being about two feet thick," was held not to contain a representation or warranty that the seam actually existed, and specific performance was decreed, although the lessees were unable to find any coal: *Jefferys v. Fairs*, 4 Ch. D. 448. "All that the agreement amounts to is a licence to enter and search for the vein of coal and make what they could of it": Bacon, V.-C. It would, probably, have been held to be a misdescription if the vendor had advertised the land containing the seam of coal for sale under the same description, because the advertisement would imply that the seam was two feet thick in one part at least, *i. e.*, that the seam existed. See below, p. 38.

Construction
of certain
words.

The following words occurring in particulars of sale have had their meaning fixed by the Court:—

"Acre" means a statutory acre: *Portman v. Mill*, 2 Russ. 570.

"Clear yearly rent," as between vendor and purchaser, means a rent clear of all outgoings and incumbrances, except those (such as land tax) which are usually, or by local custom, borne by the landlord: per Lord Hardwicke in *Tyrconnel v. Ancaster*, 2 Ves. sen. at p. 504. And a representation that the estate "clears a net value of 90% per annum" is false if the owner has to spend 50% per annum in repairing a sea wall: *Shirley v. Stratton*, 1 Bro. C. C. 440.

"Ground rent" is the sum paid by the owner or builder of houses for the use of land to build on, and is, therefore, much under what it lets for when it has been built on: *Bartlett v. Salmon*, 6 D. M. & G. 33.

The statement that certain cottages on the property are "in the occupation of the S. colliery or their under-tenants or workmen" is not sufficient if the owners of the S. colliery are entitled to occupy without paying rent: *Brandling v. Plummer*, 2 Drew. 427.

The words "tenant at will at a yearly rent" are a sufficiently correct description of a tenant from year to year: *Pope v. Garland*, 4 Y. & C. at p. 399.

"A moiety of a plot containing 2,495 square yards" means an undivided half share in the whole plot, and the bidding being by the square yard, the purchaser was held to have contracted to pay an amount equal to 2,495 times the sum mentioned by him, and not half that amount: *Chamberlain v. Lee*, 8 L. J. N. S. Ch. 266.

In determining whether a misdescription has been committed, it is sometimes necessary to decide what construction should be placed on such expressions as "more or less," "about," "by estimation," "probable amount," &c. "More or less."

"The effect of the words 'more or less,' added to the statement of quantity, has never been yet absolutely fixed by decision, being considered sometimes as extending only to cover a small difference the one way or the other, sometimes as leaving the quantity altogether uncertain, and throwing upon the purchaser the necessity of satisfying himself with regard to it. In this instance the description is rendered still more loose by the addition of the words 'by estimation.' The estimated extent of ground frequently proves quite different from its contents by actual measurement. It cannot be contended that the terms estimated and measured have the same meaning. If a man were told that a piece of land was never measured, but is estimated to contain forty-one acres, would that representation be falsified by showing that when measured it did not contain the specified number of acres? The only contradiction to that proposition would be that it had not been estimated to contain so much."—

Per Grant, M.R., in *Winch v. Winchester*, 1 Ves. & B. 375, where a deficiency of five out of forty-one acres was held to be covered by these expressions.

It may be doubted whether *Winch v. Winchester* would now be followed to its full extent: a deficiency of nearly an eighth seems too great to be covered by such expressions as "by estimation" and "more or less."

In *Hill v. Buckley* (17 Ves. 394, at p. 400) it was said that "more or less" would cover a deficiency of two or three, but not of twenty-six, acres out of 217. But compensation was decreed for a deficiency of two acres on a sale of land described as "about 186 acres": *Calcraft v. Roebuck*, 1 Ves. jun. 221.

Property having a frontage of 69 ft. 6 in. was described as "about 63 feet frontage;" it was held that this was not a misdescription within the condition allowing compensation to the vendor: *Bourne v. London &c. Co.*, W. N. 1885, p. 109.

Property having a depth of 204 feet was described as 217 feet deep, and there was a condition that "the quantities are to be taken more or less." The deficiency was held to be immaterial: *Lethbridge v. Kirkman*, 25 L. J. Q. B. 89.

If the quantity is given not merely in acres, but in acres, roods, and perches, the particularity of the statement would convey the notion of actual admeasurement (*Hill v. Buckley*, 17 Ves. at p. 401), and the addition of the words "more or less" could only avail to cover a very slight deficiency.

But in an Irish case (*Re Ryan's Estate*, Ir. R. 3 Eq. 255) the words "deduct probable amount of tithe rent-charge, 9l. 18s. 5d.," though going minutely into the amount, were held to be sufficient to cover an actual rent-charge of 10l. 8s. 5d., and no compensation was given to the purchaser. The demand for compensation was made after completion, but the case was not decided on that ground.

"Usual covenants."

Another point of construction which has often arisen on a sale of leaseholds is what is meant by the expression "usual covenants." This is discussed at p. 71.

Misleading statements.

A statement may be made which, though literally true, is calculated to mislead. This may happen either because it is a partial statement of facts put forward as a complete statement,

or because the words used are ambiguous. Such misleading statements entitle the purchaser to relief, and may, therefore, be classed under the general head of misdescription.

The following are instances of statements literally true, but **Examples.** misleading in effect :—

A statement that woods “produced 250*l.* per annum on an average of the last fifteen years,” the fact being that that amount was only produced by racking the woods beyond the course of husbandry : *Loirndes v. Lane*, 2 Cox, 363.

The description of property as “let on a lease containing all the usual covenants to repair,” the vendor knowing, but omitting to state, that there is no person who can be made liable upon the covenants : *Flint v. Woodin*, 9 Hare, 618, at p. 621.

Where the particulars described the property as “held for twenty-one years by lease from C., who holds upon lives under the Dean and Chapter of W., with covenants to renew the same twice twenty-one years more to make a complete term of sixty-three years,” and omitted to mention that C. was only tenant for life of the church lease, and that his covenant to renew the sub-lease was not binding on his remaindermen as such, the particulars were held to be misleading : *Milligan v. Cooke*, 16 Ves. 1.

“In the occupation of C. at a rental of 42*l.*” is a misleading description if C. is not the vendor’s tenant, and does not pay rent to him : *Lachlan v. Reynolds*, Kay, 52.

The description “enclosed by a wall, with a tradesman’s entrance,” is misleading if the wall belongs to a third person and the entrance is used on sufferance : *Breuer v. Brown*, 28 Ch. D. 309.

An estate of seventy acres, sixty-two of which were leasehold, and only eight freehold, was described as “freehold estate, with leasehold adjoining.” The purchaser would have been relieved if he had not waived his right to complain of the description : *Fordyce v. Ford*, 4 Bro. C. C. 494.

But the statement on the sale of an advowson that the living would become vacant on the death of a person aged eighty-two, was held not to amount to a representation that the

incumbent's age was eighty-two : *Trower v. Neucome*, 3 Mer. 704.

The representation that the property had been mortgaged for 2,000*l.* is misleading if the mortgage comprises other property, and this fact is not stated, or if the mortgagor was compelled to redeem and to pay money to the mortgagee for having represented that the property was worth 2,000*l.* : *Mullens v. Miller*, 22 Ch. D. 194, at p. 201.

A farm forming one-third of the estate sold was described as "lately in the occupation of H., at an annual rent of 290*l.* 15*s.* Now in hand." The farm, after passing through several hands, and sometimes being unoccupied, had been occupied by H. for the quarter from Midsummer to Michaelmas for 1*l.*, and then for one year only at the rent mentioned in the particulars. When H. left, the vendor agreed to let it to N. for 225*l.*, but the agreement was afterwards cancelled. It was proved that the farm would not let for nearly so much as 290*l.* 15*s.* The Court held that the statement of the rent was meant as a test of the value of the property ; that it was an unfair test, and calculated to mislead ; and that the vendor had not shown the good faith which is requisite in preparing conditions of sale : *Dimmock v. Hallett*, 2 Ch. 21.

On the sale of a small residential property the plan showed the west side as bounded by a shrubbery, and the purchaser, inspecting the property with the plan in his hand, found on the west side a shrubbery, including three magnificent elms, bounded on the west by an iron fence, and thought he was buying everything up to the fence. The real boundary was marked by stumps only, which were hidden by shrubs. The three elms were outside the real boundary. The purchaser was not compelled to complete, as the plan was misleading, owing to the position of the only fence which was visible, although in itself the plan was quite accurate, and, whilst showing the other trees on the property, did not include the three elms : *Denny v. Hancock*, 6 Ch. 1.

Reference to
lease.

Although the property has been accurately described in the particulars, reference to another document more favourable to the purchaser may override the correct description in the par-

particulars. Thus, reference to a lease not containing restrictions mentioned in the description of the property given by the particulars has been held to entitle the purchaser to rescind if he cannot obtain a valid and subsisting lease free from such restrictions, even though the restrictions were contained in the agreement for the lease, and ought to have been inserted in the lease itself. Thus, on the sale of a "bonded sugar refinery," reference to the lease, which did not (though the agreement for the lease did) restrict the user of the property to the refining of sugar "in bond," was held to entitle the purchaser to have the property free from this restriction, notwithstanding the word "bonded" in the particulars; and as the lessors had filed a bill against the vendor to have the lease rectified by the insertion of the words "in bond," the purchase-money, which had been paid into Court, was retained there pending the decision of the suit: *Bentley v. Craven*, 17 Beav. 204. In that case it would seem the purchaser was justified in assuming that the lease showed the legal rights of the vendor, and that the particulars merely stated the use to which the property was then being put, and were not intended to mean that the property could not be put to any other use.

If the vendor intends to reserve any easements over the land, or rights inconsistent with the full enjoyment of the land, he must express his intention in clear and explicit language. Reservations.

On the sale of a house the statement that the adjoining property of the vendor is "building land," would probably not be held to be a sufficiently explicit reservation so as to entitle the vendor to build in obstruction of the light to such house: see *Swansborough v. Coventry*, 9 Bing. 305. In that case the dispute arose on the conveyance, which expressly gave the purchaser the lights and easements belonging to the house sold. There had been a single-storied house on the "building land." The Court held that the purchaser of the parcel described in the particulars as "building land" might not build so as to obstruct the other purchaser's light.

If the particulars or conditions contain any undertaking on the part of the vendor, the purchaser will be entitled to specific performance of such undertaking if specific performance is Undertaking.

possible. An undertaking to make a road and archway was specifically enforced in *Storer v. Great Western Railway*, 2 Y. & C. Ch. 48.

If the vendor, through want of title, is unable to perform his undertaking, as where he is merely a lessee, and has no power to make a specified road, the purchaser will be entitled to relief (*i. e.*, rescission or compensation according to the rules laid down, p. 97): *Peacock v. Penson*, 11 Beav. 355.

Implied
undertakings.

A contract for a lease of a "newly-built house," to contain covenants on the part of the lessee to repair, implies an undertaking on the part of the lessor to deliver the house in complete tenantable repair, proper to the character of the house: *Tildesley v. Clarkson*, 30 Beav. 419.

An agreement to let a furnished house implies a condition that the house shall be fit for occupation at the time at which the tenancy is to begin. If, then, the drainage is bad, and is not put right till after the time fixed for the commencement of the tenancy, the tenant will be entitled to rescind: *Wilson v. Finch Hatton*, 2 Ex. D. 336.

A statement by the vendor that he "guarantees" a certain amount of profit per annum will not be enforced as an undertaking; but it may amount to a misrepresentation: *Gerhard v. Bates*, 2 Ell. & B. 476. See Chap. II. p. 27.

Alteration of
property.

If the property be correctly described in the particulars, but the vendor afterwards alters the property so as to make the description incorrect, the purchaser will be entitled to the same relief as if the vendor had misdescribed the property. If the alteration is in an "essential" matter (see Chap. XIV.), the purchaser will be entitled to rescind: *Magennis v. Fallon*, 2 Mol. 561, where the vendor cut the ornamental timber (see p. 113). If non-essential, the purchaser will be entitled to compensation.

The converse proposition seems also to be true, that if the description, though false at the date of the sale, is made true before the date fixed for completion there is no misdescription. Thus, on a sale of property let to weekly tenants, the rents at the date of issuing the particulars were less than the amount stated in the particulars, but subsequently, and before the completion of the contract, were, in consequence of recent repairs

made by the vendors, raised to that amount in pursuance of a notice to that effect given to the tenants, who (apparently) acquiesced in the increase of rent; it was held that there was no misdescription: *Goddard v. Jeffreys*, 51 L. J. Ch. 57.

Where the description is the usual and proper designation of the property, the purchaser cannot complain, even if he has been deceived by such description. A house was sold by the description, "No. 39, Regency Square, Brighton"; this was the usual name of the house, although the house was not in the square but in a side street, and had no sea view. The purchaser, who had bought the house because he thought it was in the square, and so expected to have a sea view, was held to his bargain: *White v. Bradshaw*, 16 Jur. 738. But the description, "No. 58, on the north side of Pall Mall, opposite Marlborough House," was held to be a misdescription, because, though the usual name of the house was No. 58, Pall Mall, it did not abut on that street, being built at the back of No. 57, and communicating with the street merely by a passage, about 65 feet long and 3 feet 8 inches wide: *Stanton v. Tattersall*, 1 Sm. & G. 529.

Where it is clear that a literal interpretation of a description in the particulars would contravene a general rule of law or universal custom, and the description is capable of a modified interpretation or limited application, which would make it true, the purchaser cannot complain that he was deceived by such description. Thus, where a manor was sold with the representation "the fines are arbitrary," the fact being that the fines in respect of freebench were certain, but all other fines arbitrary, there was no misdescription, because fines on the admission of a widow to freebench never are arbitrary, and the description was necessarily limited to such fines as are certain in some manors and arbitrary in others: *White v. Cuddon*, 8 Cl. & F. at pp. 786 and 796. In that case, however, there was a misdescription, as the fines on descent were certain, those on alienation alone being arbitrary.

Correct
description
misleading.

Literat con-
struction
impossible.

CHAPTER II.

MISREPRESENTATION.

MISDESCRIPTION may be conveniently divided into three kinds—

- (1.) Positive Misdescription or Misrepresentation ;
- (2.) Negative Misdescription or Omission ;
- (3.) Ambiguity.

Misrepresentation.

Misrepresentation is the statement that a fact or state of things exists, or that the property sold is of a certain nature or quality when the contrary is the case.

Importance of distinction.

The distinction between positive misstatements and mere omissions or ambiguities is sometimes important. Where the purchaser is affected with notice of a fact so that he would be precluded from complaining of the vendor's omission to mention the fact, a positive misrepresentation by the vendor has the effect of excluding the notice. And where the vendor's title is not bad but only "doubtful," if the vendor has made a misrepresentation the purchaser may, in addition to rescinding, recover his deposit, but in the absence of positive misrepresentation the purchaser would not be allowed to recover the deposit: see *Nottingham Brick Co. v. Butler*, 16 Q. B. Div. 778, at p. 787.

Dehors the contract.

Misrepresentation has sometimes been distinguished from misdescription as being *dehors* the contract, *i.e.*, made in the course of the treaty but not incorporated in the contract, whilst the description is part of the contract. The judgment in *Behn v. Burness*, 3 B. & S. 751, shows the difficulty of distinguishing misrepresentation as being *dehors* the contract, because "though representations are not usually contained in the written instrument of contract, yet they sometimes are" (*ibid.*, p. 754), and the real question is not whether the statement is a misdescription or

misrepresentation, but whether it "was intended to be a substantive part of the contract": *Ibid.* It would be idle, were it not impossible, to say, with regard to any written contract of sale, what parts of the document are the agreement between the parties, and what parts are merely representations by the vendor. They are all part of the contract, though not all of equal importance; and where it is necessary to distinguish between descriptions which form "a substantive part of the contract" and those which do not, this may be done effectually by terming the one "essential" and the other "non-essential." See Chap. XIV.

It is, of course, sometimes important to distinguish between a misrepresentation contained in the contract and a misrepresentation made by parol only; but it is not expedient to mark this distinction by calling the one a misdescription and the other a misrepresentation. Moreover, the Courts have long employed the word "misrepresentation" as meaning a positive statement of that which is untrue whether the statement be *dehors* the contract or embodied therein; thus an "action for misrepresentation" would lie as well for a misrepresentation contained in the written contract as for a verbal misstatement of fact inducing the purchaser to enter into the contract.

Although, as a general rule, a vendor is not guilty of misrepresentation unless he makes some positive misstatement, there are exceptions to this rule. The vendor's statements, though literally true, may be calculated to mislead, or the conduct of the vendor or his agent may amount to misrepresentation, even though no actual misstatement of fact is made. In such cases the Court relieves the purchaser as if a misrepresentation had been made in actual words. Misleading statements.

It is not easy to distinguish between a misleading statement Ambiguity. which is literally true and an "ambiguity." Perhaps this is the difference; in an ambiguity there are two possible meanings, either of which might be taken as the true meaning by a purchaser of ordinary sense who exercises ordinary care; in a misleading statement there are two possible meanings, one true and one false, and the true meaning (*i.e.*, the meaning which makes the statement true) is one which would not be likely to occur to a person of ordinary sense.

Example.

In one case the particulars stated that part of the land to be sold was held by A. and B. "under an article of agreement for lease for four lives, bearing date 1804 and one year." In reality, the agreement was for a lease for four lives and one year from and after the expiration of a prior lease, which did not expire till 1843, and the tenants claimed to be entitled to a lease for four lives to be then named by them. The description was held to be so misleading as to exclude the effect of the notice of the lease of 1804, and to entitle the purchaser to rescind: *Martin v. Cotter*, 3 J. & L. 496. Lord St. Leonards' said, "In my opinion there is here a statement which amounts to a representation by fair construction that in the year 1804 all the lives in the lease were named. But even though that were disputed I still should be of opinion that it was the duty of the vendor to state the fact in a manner free from ambiguity, and that the purchaser is not bound to take upon himself the peril of ascertaining the true meaning of the statement." *Ibid.*, p. 507.

Detailed statements.

Great particularity in respect to some defects implies the non-existence of other defects of the same kind, and the description, though literally true, may be as misleading as an actual statement that the other defects do not exist.

Examples.

Thus, on the sale of a leasehold house near Covent Garden Market, the particulars stated "no offensive trade is to be carried on, the premises cannot be let to a coffee-house keeper or working hatter," and this was considered as implying that other businesses of a non-offensive character could be carried on. As the lease prohibited several other businesses, including that of a fruiterer (a business the prohibition of which materially reduced the value of the house), the particulars were held to be misleading, and the purchaser entitled to rescind, although the lease was read aloud at the sale: *Flight v. Booth*, 1 Bing. N. C. 370. Jessel, M. R., in *Smith v. Chadwick*, 20 Ch. Div., at p. 57, says, "Suppose a man states some of the covenants of a lease, but does not state a restrictive covenant on carrying on trade, says nothing about it, but says go and look at the lease, can a purchaser complain?" It would seem from *Flight v. Booth* that he can if the whole effect of the statement concerning the lease is misleading, even though no direct misstatement is made.

Where leasehold property, which was subject to a ground rent of 43 $\frac{1}{2}$., was put up for sale with a minute description of the rents received by sub-letting, and of a mortgage upon the property, but with no mention of the ground rent payable, this was considered as equivalent to a representation that there was no ground rent or only a very small ground rent, and the purchaser was held not to be affected by notice of the lease to which the particulars referred, and a perusal of which would have corrected the erroneous impression made by the particulars: *Jones v. Rimmer*, 14 Ch. Div. 588.

An agreement for an under-lease of a house to be granted by A. to B. stipulating that there should be the usual covenants, and that the house should not be converted into a school, was considered as amounting to a representation that A. had the power to grant a lease without any other restrictive covenants; and as A. held under a lease containing other restrictive covenants, this was held to be a misrepresentation disentitling him from specific performance although B. had notice of the head lease: *Van v. Corpe*, 3 M. & K. 269.

But on an agreement for a twenty-one years' lease, to contain a covenant by the lessor "not to let any of the adjoining land for the purpose of making and burning bricks," the lease to be in the form of one to be inspected at the office of the lessor's solicitor, the lessee was held to be affected with notice of the fact (ascertainable from the form of lease referred to) that the covenant was to be confined to the lessor's life, and was not allowed to resist specific performance on the plea that the wording of the agreement was calculated to mislead him into thinking that he would get a covenant extending for the whole of the term: *Daves v. Betts*, 12 Jur. 709 (Lord Cottenham, L. C., reversing on this point Wigram, V.-C.).

Further, the silence of the vendor may, under certain circumstances, amount to an actual misrepresentation. If, for instance, the vendor, on being informed by the purchaser of his intention to use the property in a particular way, remain silent, his silence is equivalent to a representation that he does not know of anything which would prevent the purchaser from using the property in that way. Vendor's silence.

Examples.

Thus if, on the treaty for an under-lease, the sub-lessee inform the sub-lessor that he intends to carry on a certain business on the premises, and the sub-lessor does not inform the sub-lessee that there are restrictive covenants in the superior lease which prohibit the sub-lessee's intended business, the silence of the sub-lessor is equivalent to a representation that there are no such covenants: *Flight v. Barton*, 3 My. & K. 282.

If the vendor of a lease which prohibits dangerous trades sells to an oil-merchant, who informs the vendor that he intends to store large quantities of oil on the premises, and the vendor thereupon tells him of certain prohibitions in the lease, but omits to state that dangerous trades are prohibited, this omission is equivalent to a representation that dangerous trades are not prohibited; the vendor is presumed to know the terms of his lease, and in such a case the purchaser is not bound to look at the lease: *Powder v. Barrett*, 19 L. R. Ir. 450.

On the sale of a *Claude*, the purchaser, who was influenced by the name of the owner as a guarantee of the genuineness of the picture, supposed the picture to be the property of Sir F. Agar, being led to that supposition by the fact that the agent was selling at the same time a number of Sir F. Agar's pictures. The agent knew of the purchaser's mistake, but did not undeceive him. The purchaser was allowed to rescind the contract: *Hill v. Gray*, 1 Stark. 434. In *Keates v. Earl Cadogan*, 10 C. B. 591, Jervis, C. J., says there was aggressive deceit in *Hill v. Gray*; but this does not seem to have been the case.

In a conversation between the vendor, the vendor's solicitor, and the purchaser's solicitor, the vendor said there were restrictive covenants in one of the old title deeds, and thereupon the vendor's solicitor said he was not aware of any restrictions. This statement was considered equivalent to a representation that the solicitor had seen the title deeds and found no restrictive covenants in them: *Nottingham Brick Co. v. Butler*, 16 Q. B. Div. 778.

State of the
property.

Even the state of the property coupled with the vendor's silence may in certain cases have the effect of misrepresentation so as to exclude notice.

Example.

Thus, although the purchaser of a lease has notice of the

restrictive covenants contained in the lease, the effect of this notice is nullified if, at the time of the sale, a trade prohibited by the restrictive covenants is being actually carried on upon part of the demised premises. In such a case the purchaser is considered as "justified in assuming that the premises were lawfully in the condition in which he saw them": *Spinner v. Walsh*, 11 Ir. Eq. Rep. 597.

Misrepresentation, in order to entitle the purchaser to relief, must be misrepresentation of a matter of fact; a misrepresentation of a matter of opinion merely, or of law, is not enough.

Puffing Statements and Misrepresentation as to matters of opinion.

A vendor is allowed to use laudatory epithets for the purpose of puffing the property which he is selling, and to make statements as to the value of the property, or as to probable profits, chances, risks, or other matters of opinion, provided that the statement does not involve a misrepresentation of a specific fact. The use of such epithets and statements of opinion, even if the Court considers them to be not justified by the facts, will not entitle the purchaser to relief. The rule of Roman law is the same; *simplex commendatio non obligat*. The theory is that praise conferred by the vendor and the vendor's estimate of the value of his own property do not influence, or at all events ought not to influence, the purchaser's judgment, and that, even if they are unfounded, the purchaser has suffered no wrong because he relied on his own opinion, or accepted the vendor's opinion at his own risk. See Chap. VI., p. 49.

Puffing
statements.

The principle that a mere puffing statement or expression of opinion by the vendor will not, even if unfounded, entitle the purchaser to relief, is applicable as well to actions of deceit as to actions for rescission or specific performance (see *Harvey v. Young*, Yelv. 20); and the same principle is observed in actions against directors for misrepresentations in the prospectus (see *Bellairs v. Tucker*, 13 Q. B. D. 562, *infra*, p. 27); and in actions on marine policies (see *Anderson v. Pacific Insurance Co.*, L. R. 7 C. P. 65).

Laudatory epithets and statements of opinion by the vendor

Statements
of opinion.

are distinguished from definite misdescriptions by the use of such phrases as "mere puffing statements," "vague laudatory flourish," "a mere flourishing description by an auctioneer," "loose opinion of the auctioneer or vendor as to an obvious fact," "puffing or speculative commendation." It is not always easy to say whether a given statement is a puffing statement or expression of opinion, or whether it amounts to a statement of fact. "It is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. In a case where the facts are equally well-known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such opinion is in a sense a statement of a fact, about the condition of the man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion": per Bowen, L. J., in *Smith v. Land Corporation*, 28 Ch. Div. 7, at p. 15.

Expert's
opinion.

If the vendor make a false statement as to the opinion of an expert, this, of course, is a misstatement of fact: see p. 28. But if he correctly state the expert's opinion and that opinion is wrong, there is no misstatement, and the purchaser who trusted the expert cannot say that he was deceived by the vendor. The purchaser might, perhaps, in some cases, have a right of action against the expert: *Cann v. Willson*, 39 Ch. D. 39.

Examples of
puffing state-
ments.

"Uncommonly rich water meadow land" was held to be no misrepresentation, although the land was in reality imperfectly watered: *Scott v. Hanson*, 1 Sim. 13; on appeal 1 Russ. & Myl. 128. Leach, V.-C., and Lord Lyndhurst, there treated the epithet "uncommonly rich" as applicable to the quality of the land, and not of the irrigation, and Leach, V.-C., added that as applied to the land the statement "professed to be nothing more than the loose opinion of the auctioneer or vendor as to the obvious quality of the land, upon which the vendee ought not to have placed, and cannot be considered to have placed, any reliance."

"Part arable and part marsh land in a high state of cultivation" is a misrepresentation if the marsh land is in an impoverished condition: *Dyer v. Hargrave*, 10 Ves. 505. If the land were in fair condition, such a description would probably be regarded as mere puff. It is to be noticed that in *Dyer v. Hargrave* the sale took place at the breaking up of a frost, when it would be difficult for the purchaser to judge of the condition of the land.

"Fertile and improvable" is mere puff, although the land in question has been abandoned as useless. But if a considerable part of the land is covered with water, or otherwise irreclaimable, the statement amounts to a misdescription: *Dimmock v. Hallett*, 2 Ch. 21, 27.

"The land in course of time may be covered with warp from the river Trent, and considerably improved at a moderate cost," was held not a misdescription, although there were no means of warping within three miles, and the expense would be 25*l.* an acre: *Ibid.*

"Has lately undergone a thorough repair" is a statement of fact, and the house being ruinous and condemned by the district surveyor, the purchaser was allowed to rescind: *Loyes v. Rutherford*, Sug. p. 331.

"Substantial and convenient" and "having five bedrooms" was not considered to be a misdescription, although one of the external walls was only half a brick thick, and the walls had slight cracks in them, and two of the bedrooms, though just large enough to contain a bed, were mere inner rooms or closets without fire-places: *Johnson v. Smart*, 2 Giff. 151, affirmed on appeal 21 July, 1860.

But "substantial and well-built" was considered a misstatement of fact where the buildings were seriously defective: *Cox v. Middleton*, 2 Drew. 209.

"Brick-built" is a misdescription if the house is partly brick, and partly timber and lath and plaster: *Powell v. Double*, Sug. 29.

"Not damp" is a statement of fact, not opinion: *Stranguays v. Bishop*, 29 L. T. 120.

"Well supplied with water," in the description of a ware-

house (with small steam engine) situate in a district where springs abound, and factories (though not warehouses) are usually supplied with water from wells on the premises, is a misdescription if the only water supply is from waterworks on payment of a substantial water rate (20l. per annum): *Leyland v. Illingworth*, 2 De G. F. & J. 248.

"Residence fit for a respectable family" is mere puff. But the words "with a demesne tastefully laid out," being explained by a map having delineated upon it clumps of trees and shrubs, and showing the house surrounded with ornamental timber, are a material misrepresentation if such trees, &c., do not exist: *Magennis v. Fallon*, 2 Molloy, at p. 589.

The words "eligible for the erection of genteel residences of a superior description" were not treated in *Peacock v. Penson*, 11 Beav. 355, as mere puff. In that case the vendor who had by the conditions undertaken to lay out roads shown on a map, was held not to be entitled to cut up the land differently in a manner likely to attract a lower class of residents.

On the sale of a life interest the vendor stated that the tenant for life was a "very healthy gentleman, aged forty-eight." This statement was afterwards modified to "a healthy gentleman, aged forty-eight, whose life is insurable." The fact was, that the insurance companies though willing to insure the life would do so only on payment of a much higher rate than the highest rate of insurance of a healthy life of the same age. This was held to be misdescription and not mere puff: *Brealey v. Collins*, You. 317.

On the sale of an annuity the vendor stated that the grantor was a man "in good circumstances, and of large property." The fact was that he was then, and had for some time been, in prison for debt. The statement was, in an action of deceit brought by the purchaser, held to be a mere puffing statement: *Daves v. King*, 1 Stark. N. P. C. 75 (*sed qu.?*).

The description, "let to F. a most desirable tenant," has been held to be not a mere expression of opinion, but to contain an implied assertion that the vendor knows of no facts leading to the conclusion that F. is not a satisfactory tenant, and, F. being at the time to the knowledge of the vendor unable to pay his

rent, the purchaser was relieved: *Smith v. Land Corporation*, 28 Ch. Div. 7.

On the sale of £500 Consols standing in the names of directors, and held by them as an indemnity against costs in a pending Chancery suit, and subject thereto upon trust for the vendor, the vendor stated these facts, and added, "There is a considerable sum applicable for payment of costs, and such costs will be paid thereout, being in fact part of a residuary estate, shares in which have been the subject of sales to insurance companies. The estate of the testator was upwards of 100,000*l.*, the residuary estate exceeded 20,000*l.*; the fund of 500*l.* and dividends may therefore be looked upon as a sound and secure investment." The vendor had been informed by the directors' solicitor that they had paid 1,250*l.* costs which they hoped to get back from the estate, but that the whole of the 500*l.* might possibly be absorbed by the costs. It was held that under the circumstances the vendor's statements were misleading: *Mathias v. Yetts*, 46 L. T. N. S. 497.

On an agreement for a lease of a limestone quarry the lessor represented that the lime was "fit for the London market," the lessee having previously said that, unless the lime were fit for the London market he could not take the lease. It was proved that the words meant in the trade lime of the best quality. The statement was held to be a misdescription of a specific fact: *Higgins v. Samels*, 2 J. & H. 460.

On the sale of an advowson, the vendor stated "a voidance of this preferment is likely to occur soon," the fact being that the then incumbent was only thirty-two. This was considered not to be a definite misdescription, and the purchaser was not relieved: *Trower v. Newcome*, 3 Mer. 704. Matters of probability.

"The directors feel justified in stating that they confidently believe the profits of this company will be more than sufficient to pay 50 per cent." was held to be a mere expression of opinion: *Bellairs v. Tucker*, 13 Q. B. D. 562.

The statement in the prospectus of a company "we do not hesitate to guarantee a minimum annual dividend of 33 per cent." was, however, held to be a fraudulent misrepresentation rendering the directors liable for damages: *Gerhard v. Bates*, 2 Ell. & B. 476.

Value.

An estate was described as of "nearly equal value with freehold, being held by a college lease for thirty-three years at a ground rent of 3*l.* 7*s.*, and renewable every ten years upon payment of a small fine," the facts being that the renewal and the fine were both arbitrary, the amount of the fine last paid being 700*l.* It was held that the representations as to the fine being "small" and the tenure being "nearly equal to freehold" were indefinite and calculated to put the purchaser upon inquiry. Under certain circumstances such representations might be a ground for rescission, as if the vendor knew that the purchaser entertained a false idea of the fine. But in this case the purchaser tried to find out the amount, and offered 150*l.* if the vendor would pay the surplus; the refusal of this offer ought to have put him on inquiry: *Fenton v. Browne*, 14 Ves. 144.

The statement that a ground rent is "amply secured" would seem to be only a puffing statement; at any rate, if due notice of the real state of the facts is given, the purchaser will not be entitled to relief because of such words even if untrue. See *Smith v. Watts*, 4 Drew. 338.

The assertion by the vendor that the land is worth so much is a mere expression of opinion: *Harvey v. Young*, Yelv. 20. But the statement that the estate "clears a net value of £—— per annum" is a statement of fact: see p. 10.

The statement that a colliery actually realised £—— annual profits is, if untrue, a misrepresentation; but the statement that a colliery producing such profits is worth £——, is a mere matter of opinion and judgment: *Powell v. Elliot*, 10 Ch. 424.

The statement that F. and C., two timber merchants, had valued the timber at 3,500*l.*, the fact being that they had valued it at 2,500*l.* only, is a misrepresentation entitling the purchaser to relief: *Buxton v. Lister*, 3 Atk. 383, at p. 386.

In another case, upon the treaty for the sale, the purchaser told the vendor he could not help thinking (as the fact was) that the property had been offered to him before at thousands less, and asked the vendor whether he had ever put the property into the hands of an agent to sell at thousands less than he was then asking. The vendor falsely answered "No." It was held

that the purchaser was entitled to rescind on the ground of this misrepresentation : *Roots v. Snelling*, 48 L. T. N. S. 216.

Misrepresentation of Law.

The vendor's misrepresentation of a matter of law (unless, ^{Matters of law.} perhaps, it was made with the intention of deceiving the purchaser), will not entitle the purchaser to relief. The purchaser is assumed to know the law, and the misrepresentation of the vendor on that assumption has no effect on the purchaser's mind.

It is not always easy to say of a given statement whether it is a statement of fact or a statement of law. If a fact is stated which involves a conclusion of law, the statement may be made so as to be a statement of the fact only, or it may be made as a statement of law followed by a statement of the fact by way of deduction from the law so stated.

"A misrepresentation of law is this: when you state the facts and state a conclusion of law, so as to distinguish between facts and law. The man who knows the facts is taken to know the law; but when you state that as a fact which no doubt involves, as most facts do, a conclusion of law, that is still a statement of fact and not a statement of law. Suppose a man is asked by a tradesman whether he can give credit to a lady, and the answer is, 'You may, she is a single woman of large fortune.' It turns out that the man who gave that answer knew that the lady had gone through the ceremony of marriage with a man who was believed to be a married man, and that she had been advised that that marriage ceremony was null and void, though it had not been declared so by any Court, and it afterwards turned out they were all mistaken, that the first marriage of the man was void, so that the lady was married. He does not tell the tradesman all these facts, but states that she is single. That is a statement of fact. If he had told him the whole story, and all the facts, and said, 'Now, you see, the lady is single,' that would have been a misrepresentation of law. But the single fact he states, that the lady is unmarried, is a statement of fact, neither more nor less; and it is not the less a statement of fact

that in order to arrive at it you must know more or less of the law." Per Jessel, M.R., in *Eaglesfield v. Marquis of Londonderry*, 4 Ch. Div. at p. 702.

Where a tramway company's Act enabled them to employ animal power, and, with the consent of the Board of Trade, steam or other mechanical power, a statement by the directors who had not obtained the consent of the Board of Trade, that by their special Act the company had a right to use steam power instead of horses, was held to be a misrepresentation of fact: *Peek v. Derry*, 37 Ch. Div. 541; see pp. 571 and 581.

On the sale of an agreement for a lease to contain the "usual covenants," the vendor sent the purchaser a copy of the agreement for the lease, and, in answer to the purchaser's inquiries, said that the lessee would not have to do substantial repairs. As a covenant to do substantial repairs is a usual covenant, this was a misrepresentation. But it was held that it was a misrepresentation of law, not of fact: *Kendall v. Hill*, 6 Jur. N. S. 968.

Fraudulent
misrepresentation
of law.

If a representation is made fraudulently, the purchaser may perhaps (though this is doubtful) be relieved, even if it is a misrepresentation of law only. "Where there is a representation made as to a mere matter of law, it is in nineteen cases out of twenty made by a person who does not know the law better than the person to whom it is made, and at whose risk it is taken and acted upon. Still I am not prepared to say, and I doubt whether a man who wilfully misrepresented the law would be allowed in equity to retain any benefit he got by such representation": per Bowen, L. J., in *West London Commercial Bank v. Kitson*, 13 Q. B. Div. 360, at p. 362.

Misrepresentation of Intention.

Intention.

The effect of the expression by the vendor of his intention is doubtful. If the statement of intention is regarded as equivalent to an undertaking, then, if it be embodied in the agreement for sale, the purchaser could enforce it, or if the vendor were unable to carry out the intention the purchaser would be entitled to rescission or compensation; and if it be not embodied in the

agreement, the vendor would not be entitled to specific performance without carrying it out.

A representation made by the lessor in an agreement for a lease that the covenants contained in the draft restraining the use of the house for trade or business were usually contained in leases granted by the lessor of his other houses in that estate, amounts to a collateral contract with the lessee that the other houses should continue to be used as private dwelling-houses, and such contract can be enforced by the lessee, even though no undertaking or covenant on the part of the lessor is inserted in the lease: *Martin v. Spicer*, 34 Ch. Div. 1.

But as a representation of intention appears to be often regarded by the Court as not amounting to an undertaking or contract, it becomes material to consider the question whether the purchaser can obtain relief for a misrepresentation by the vendor of his intention.

It is clear that a representation of intention, if true at the time it is made, is not falsified by an alteration of that intention. Further, unless the representation virtually amounts to a promise or undertaking, the vendor is entitled to alter his intention, notwithstanding the representation: *Jordan v. Money*, 5 H. L. Ca. 185. "The doctrine of estoppel by representation is applicable only to representations as to some state of facts alleged to be at the time actually in existence, and not to promises *de futuro*, which, if binding at all, must be binding as contracts": per Lord Selborne in *Maddison v. Alderson*, 8 App. Ca. 467, at p. 473. "A representation that something will be done in the future cannot either be true or false at the moment it is made, and although you may call it a representation, if it is anything it is a contract or promise": per Mellish, L. J., in *Beattie v. Lord Ebury*, 7 Ch. 777.

If, however, a person states as his intention that which never was his intention, this is a misrepresentation of a fact, and from the nature of the case it is a fraudulent misrepresentation.

Where the directors of a company issued a prospectus inviting subscription for additional capital, to be employed in improving the buildings of the company and purchasing horses and vans, their real object being to obtain money to meet their pressing

pecuniary liabilities, it was held that this misrepresentation of intention was a misrepresentation of fact also, and the directors were liable to an action of deceit: *Edgington v. Fitzmaurice*, 29 Ch. Div. 459. "A mere suggestion of possible purposes to which a portion of the money might be applied would not have formed a basis for an action of deceit. There must be a misstatement of an existing fact; but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation of the state of a man's mind is therefore a misstatement of fact": per Bowen, L. J., *ibid.*, at p. 483.

It might perhaps be argued that as the intention, even if it existed, might be altered at any moment, the misstatement of the intention is an immaterial misrepresentation, one not *dans locum contractui*—in other words, one upon which the party to whom the statement is made does not rely, or on which, if he relies at all, he relies at his own peril. See Chap. VI., p. 49. "He knows or ought to know that he takes his chance of the promisor changing his mind, and therefore he is in no worse position if the statement is false when it is made, *i. e.*, if that intention is not really entertained than if it is true when it is made, *i. e.*, if the intention exists and the person making the statement intends to revoke it if he pleases": per Stephen, J., in *Alderson v. Maddison*, 5 Ex. D. 293, at p. 303.

But even if this reasoning is correct, the statement of intention in *Edgington v. Fitzmaurice*, 29 Ch. Div. 459, might be regarded as an implied misrepresentation of a fact. The statement that the directors intended to spend the money in improving the buildings implied that the directors knew of nothing to prevent them from so applying the money or to make such an application of the money improbable. As they were hard pressed by the creditors of the company, this statement was untrue: cf. Bowen, L. J.'s judgment in *Smith v. Land Corporation*, 28 Ch. Div. 7, quoted above, p. 24.

In one case the vendor, previously to the sale, handed the auctioneer a paper in his own writing, which stated that it was in

contemplation to widen a lane leading to the property by purchasing the houses at the entrance and to form a new street, as represented by the dotted line on the plan annexed to the particulars, and that, if the same could not be otherwise done, the vendor would apply to Parliament for an Act to enable him so to do. This paper, by the vendor's directions, was read to the persons assembled at the sale. The vendor was not the owner of the land over which the new street was to be made. The Court held that the vendor was not entitled to specific performance without carrying his undertaking into effect: *Beaumont v. Dukes*, Jac. 422. It would appear from p. 425 of the report that the Court thought the statement of intention was false, as the vendor did not design to carry it into effect. But the purchaser would have been entitled to relief also on the ground of the misdescription contained in the plan, and on the ground that the statement was, in fact, an undertaking, and that a parol contract had been entered into which the defendant could insist on having read into the agreement. See p. 163.

Where, pending negotiations for a building underlease, the sub-lessor, who was lessee of adjacent land, made a representation that he could not obstruct the sea-view, being bound by covenants himself, and afterwards surrendered his lease and obtained a new one without the covenants, the sub-lessee, who had taken the underlease and erected buildings on the faith of the representation, was held entitled to an injunction restraining the sub-lessor from so building as to obstruct the sea-view: *Piggott v. Stratton*, John. 341; affirmed, 1 De G. F. & J. 33. The principle involved in this decision is thus stated by Lindley, L.J., in *Martin v. Spicer*, 34 Ch. Div. 1, at p. 12: "If a man makes a representation that property is subject to covenants affecting it permanently, and he does so in order to induce a person to buy part of such property, and the person buys on the faith of such representation, the representation amounts to a contract by the vendor that he will not do anything to prevent the property from continuing what he has represented it to be." The *ratio decidendi* of *Piggott v. Stratton* seems, however, to have been that the representation operated by way of estoppel rather than as a contract. See the words of Lord Hatherley, John.

p. 359—"A man who has induced another to enter into a contract with him, by representing an actual state of things as a security for the enjoyment of an interest which he has himself created, for valuable consideration, is not at liberty by his own act to derogate from that interest by determining the state of things which he has so held forth as the consideration for entering into the contract."

There the representation was one of fact; what the vendor said amounted virtually to a representation that the existing state of things must continue, and that the sub-lessor *could* not get rid of his liability, rather than a representation that he did not intend to get rid of his liability by surrendering the lease or otherwise.

CHAPTER III.

OMISSIONS.

It is often said that the vendor is not under an obligation to disclose defects in the property which he is selling, even if he knows that the purchaser is ignorant of the true state of the facts. The maxims used are *caveat emptor* and *aliud est celare, aliud tacere*. The "mere silence" of the vendor, or his "passive acquiescence in the purchaser's self-deception" (Cockburn, C. J., in *Smith v. Hughes*, L. R. 6 Q. B. 597), is opposed to an "industrious concealment" (*Shirley v. Stratton*, 1 Bro. Ch. C. 440) or "aggressive deceit" (*Keates v. Earl of Cadogan*, 10 C. B. 591) on the vendor's part; and while the latter is considered as entitling the purchaser to relief, the former is regarded as perfectly justifiable. The law is, however, laid down in too general a way if a sale of real property, and not of chattels, is under consideration.

In the first place, the maxim *caveat emptor* does not apply to latent defects, as to which see below, p. 37. And if the vendor wishes to preclude the purchaser from objecting to a defect in his title he must mention the defect in the particulars or conditions of sale, unless he is content to trust to the chance of the purchaser's investigation of the title being so careless that the defects are not discovered.

It seems, on the whole, more correct to lay it down as the general rule that the mere silence of the vendor as to defects in the property, or in the title to the property, is sufficient to entitle the purchaser to rescind or obtain compensation, and then to set out the rules as to patent defects, and such defects in title as need not be mentioned (or which, properly speaking, are not to be regarded as defects at all) as exceptions to the general rule.

Examples.

The following are instances of defects in the property, or the title to the property, the omission of the vendor to mention which has been considered to entitle the purchaser to relief:—

Mortgages which the vendor did not intend to discharge: *Torrance v. Bolton*, 8 Ch. 118.

Ground rent to which the property was subject: *Jones v. Rimmer*, 14 Ch. Div. 588.

Rentcharges or quit-rents: *Esdaile v. Stephenson*, 1 Sim. & Stu. 122.

Restrictive covenants: *Phillips v. Caldcleugh*, L. R. 4 Q. B. 159.

The liability to repair the chancel of the parish church: *Forteblow v. Shirley*, cited in *Binks v. Lord Rokeby*, 2 Sw. 223.

Leases to which the property is subject: *Hughes v. Jones*, 3 De G. F. & J. 307.

The absence of title to an underground cellar beneath the property sold: *Whittington v. Corder*, 16 Jur. 1034.

The fact that there is no proper access to the property, *e.g.*, on the sale of arable land, the absence of a right of way for carts and carriages: *Denne v. Light*, 8 De G. M. & G. 774; *Curling v. Austin*, 2 Dr. & Sm. 129.

On a treaty for a lease of a mine, the omission to state that a material portion of the mine was under land to which the lessor had no title: *Mostyn v. West Mostyn Colliery Company*, 1 C. P. D. 145.

On the sale of an annuity, the omission to state that it was redeemable: *Coverley v. Burrell*, 5 B. & Ald. 257.

On the treaty for the sale of the residue of a lease of which 12½ years were unexpired, the omission to mention the lessor's right of option to determine the lease at the end of five years: *Weston v. Savage*, 10 Ch. D. 736.

On the sale of a lease, the omission to state that owing to the breach of covenants by the lessee the lease was then voidable: *Penniall v. Harborne*, 11 Q. B. 368; the omission to state that an agreement for a lease was voidable: *Brewer v. Broadwood*, 22 Ch. D. 105. On the sale of a derivative lease, the omission to state that other property, part of the land demised by the original lease, had been sub-demised by a lease not containing

restrictive covenants in accordance with those contained in the original lease: *Waring v. Hoggart*, Ry. & M. 39.

There are many matters which the vendor is not bound to mention.

(1.) The vendor need not mention patent defects.

Patent defects.

A patent defect is a defect in the physical condition of the property which a purchaser would be likely to discover if he inspected the property with ordinary care. A latent defect is one which a purchaser, inspecting the property with ordinary care, would not be likely to discover.

In Dart, p. 101, a patent defect is defined as "such as may be discovered by ordinary vigilance on the part of a purchaser," and a latent defect as "such as the greatest attention would not enable him to discover." This definition leaves a third class of defects which are neither patent nor latent, *viz.* those not discoverable by ordinary vigilance. It seems more correct to regard as latent all defects which are not patent. In *Lucas v. James*, 7 Ha. 410, at p. 418, a latent defect is defined as "one which a provident purchaser could not discover."

The existence of a way round, and a footpath across, a field which was sold as a "meadow," was held to be a patent defect, and one which did not entitle the purchaser to resist specific performance: *Bowles v. Round*, or *Oldfield v. Round*, 5 Ves. 508. Lord Manners, in *Ellard v. Lord Llandaff*, 1 Cox, at p. 249, referring to *Bowles v. Round*, says, "I believe the Bar was not very well satisfied with the decision. . . . The purchaser was undoubtedly extremely negligent not to look at the estate before he purchased it. Had he used ordinary caution he would have discovered the easement." Jessel, M. R., in *Cato v. Thompson*, 9 Q. B. Div. 616, at p. 619, referring to *Bowles v. Round*, though not mentioning it by name, treats it as a case where the purchaser knew of the defect. This, however, is incorrect.

The existence of a waterway through the property is not generally a patent defect, and a purchaser was not presumed to know that there was an easement of waterway over the property, or to be affected with notice thereof, from the fact that he was well acquainted with the property, and constantly passed some wells which were supplied by an underground watercourse

running through the property: *Shackleton v. Sutcliffe*, 1 De G. & Sm. 609.

Other ex-
amples.

A house was sold, over part of which a room about 3 feet by 17, belonging to another house, projected. The plan, being merely a ground plan, did not notice this projection. The purchaser had no knowledge of the internal state of the building, and there was no evidence that the defect could have been detected externally by the eye. It was held that this was a latent defect, and the purchaser was relieved: *Pope v. Garland*, 4 Y. & C. 394.

In the case of a house bought or taken for a family residence, the existence of a nuisance arising from the immoral character of certain houses in the immediate neighbourhood is a latent defect, and it would seem that if the vendor knew of it and omitted to inform the purchaser, the latter might rescind, but not if the vendor himself were ignorant of the fact: per Shadwell, V.-C., in *Lucas v. James*, 7 Ha. 410, at p. 418 (*sed qu.*).

On an agreement for a lease of a coal mine, the lessor did not inform the lessee that he had worked the mine twenty years ago, and abandoned it as unprofitable. The lessee examined the mine himself before the contract, and saw the abandoned workings. The Court granted specific performance: *Haywood v. Cope*, 25 Beav. 140.

If the whole of the coal had been gotten this might, perhaps, entitle the purchaser or lessee to relief: see remarks of Page-Wood, V.-C., in *Ridgway v. Sneyd*, Kay, 627, at p. 635. If the vendor or lessor knew that all the coal had been gotten by former workings, it would seem to be fraudulent for him to sell or lease the mine without mentioning the facts.

On the sale of a lease containing a covenant to deliver up the premises in good repair at the end of the term, if any of the buildings have been removed, this should be mentioned: *Granger v. Worms*, 4 Campb. 83. The non-existence of the buildings is not a patent defect, because the purchaser does not necessarily know that there ever were such buildings. And though in that case the lease which contained a description of the buildings (including the summer-house, which was afterwards pulled down) was produced and read aloud at the sale, the purchaser

might either not have heard it, or not have paid attention to the point.

A defect which is patent to a professional man (*e.g.*, a surveyor), but not to an ordinary man, is not a patent defect unless the purchaser has himself the requisite professional knowledge, or has employed a professional man: *Tildesley v. Clarkson*, 30 Beav. 419, at p. 430. Professional knowledge of purchaser.

A defect is patent if it is sufficiently visible to "arouse the vigilance of any intending" purchaser, even though the full extent of the defect is not visible. Thus, where there were cracks in a wall, and the wall was eighteen inches out of the perpendicular, this was considered sufficient to put an intending lessee on his guard, although the full extent of the repairs necessary to be done could not be discovered without an examination of the foundations: *Cook v. Waugh*, 2 Giff. 201, at p. 206. Defect partially visible.

(2.) The vendor need not mention defects to which land usually is subject. Defects common to all land,

Thus, the existence of tithe commutation rent-charge, or tithes, need not be mentioned, because, in the absence of information that the land was tithe free, an ordinary purchaser would infer that the land was subject to tithes: Sug. 322.

(3.) Nor need he mention defects which are necessarily or usually inherent in land of the same tenure as that which is being sold. These are not, strictly speaking, "defects." or to land of that tenure.

Thus, on the sale of copyholds, it is not necessary to mention that the lord's consent is requisite to enable the tenant to work minerals, because this is the same in all copyholds: per Romilly, M. R., in *Hayford v. Criddle*, 22 Beav. 477, at p. 480.

On the sale of an underlease, the vendor need not mention the liability to forfeiture in case of a future breach of the covenants by the original lessee, because this liability is incidental to every underlease: *Hayford v. Criddle*, 22 Beav. 480.

If the purchaser is informed that the property is subject to restrictive covenants he is not entitled to refuse to complete on the ground that the vendor neglected to inform him that there was a power of re-entry on breach of the covenants: per North, J., in *Dunn v. Flood*, 25 Ch. D. at p. 634.

On the sale of a remainder or reversion expectant on the

death of a tenant for life, the vendor need not mention the fact that succession duty will be payable by the purchaser: see *Cooper v. Treuby*, 28 Beav. 194.

Act of Par-
liament.

(4.) The vendor need not mention a local and public Act of Parliament affecting the property, although such Act imposes a liability on the property.

Thus, on a sale of land subject to certain drainage taxes imposed by a public Act, the Court granted the vendor specific performance without compensation, although he had omitted to mention these taxes: *Barraud v. Archer*, 2 Sim. 433; affirmed 2 Russ. & M. 751. In that case the land was described as "fen-land" and the purchaser was an attorney living in the neighbourhood; on the other hand, the vendor mentioned other drainage taxes which probably threw the purchaser off his guard.

Where the rental (*i. e.* particulars) stated that the land was subject to a terminal annual charge in respect of the Lough Corrib Arterial Drainage, but omitted to state the liability to a charge for maintenance under the public Act, under the provisions of which the Lough Corrib Drainage had been effected, the purchaser was not allowed any compensation: *Re Ryan's Estate*, Ir. R. 3 Eq. 255.

But the omission to mention a local and public Act of Parliament giving a public body a right of preëmption was held to entitle the purchaser to rescind: *Ballard v. Way*, 5 L. J. (N.S.) Exch. 207, where, however, Parke, B., described the Act as a private Act. The decision seems to be opposed to those above mentioned, but may perhaps be supported on the special ground that the Act did not sufficiently point out what property was contained in it.

Customs.

(5.) The vendor need not mention any usual and well-known customs as to the rights of tenants: see *Phillips v. Miller*, L. R. 10 C. P. 420; or as to mining rights: Dart, p. 132.

But the omission to mention any special and unusual right of tenants different from the known custom of the country will entitle the purchaser to relief; *e. g.*, the right of the tenants to be allowed market value for hay, &c., when the custom in the country is to allow "fodder value" only: *Phillips v. Miller*, L. R. 10 C. P. 420, reversing 9 C. P. 196.

(6.) Mere claims put forward by third persons need not be Claims. mentioned, unless the vendor is asked whether he knows of any claims: *Brownlie v. Campbell*, 5 App. Ca. 925, at p. 944.

On the sale of a leasehold house, the omission to mention that the lessor had given the vendor a peremptory notice to repair was held to entitle the purchaser to relief, although the purchaser knew that the house was dilapidated, and probably knew or had notice of the liability to repair: *Stevens v. Adamson*, 2 Starkie, 422. In that case the purchaser was ejected by the lessor for non-compliance with the notice to repair, and would, probably, have been able to avoid ejectment by repairing if he had known of the notice.

(7.) Other matters.

Other matters.

The vendor is not bound to disclose to the purchaser the result of a recent valuation of the property: *Abbott v. Sircorder*, 4 De G. & S. 448.

Nor the fact that the vendor has previously attempted to sell the property: *Warde v. Dixon*, 7 W. R. 148. But if the vendor, on being asked as to this, wrongfully denies it, the purchaser will be entitled to relief: *Roots v. Snelling*, 48 L. T. N. S. 216.

Nor the fact that part of the rent stated in the particulars has been sometimes remitted in consequence of the tenant's complaint that the rent was excessive: *Abbott v. Sircorder*, 4 De G. & S. 448.

In another case the vendor stated that the farm was let to "a tenant from year to year at a moderate and reduced rental," specifying the amount. Before the sale, the tenant had written a letter to the vendor announcing his intention of giving up the farm, but no proper notice to quit had been given. It was held that the vendor was not bound to mention this letter, and that there was no misdescription as to the rental of the property: *Davenport v. Charsley*, 54 L. T. N. S. 372.

On the grant of a personal annuity, the grantor is not bound to mention the fact that he is under large pecuniary liabilities: *Adamson v. Ecitt*, 2 Russ. & M. 66. The purchaser in that case was an auctioneer, and the terms of the purchase raised the presumption that the grantor was in embarrassed circumstances.

On the sale of an advowson, no statement by the vendor or inquiry by the purchaser having been made as to the income of the living, the purchaser claimed compensation for an undisclosed charge in favour of Queen Anne's Bounty. The Court refused to grant compensation, chiefly on the ground that the charge did not affect the value of the advowson, and that, even if the next presentation would be less valuable, the subsequent presentations would be more valuable: *Edwards-Wood v. Marjoribanks*, 7 H. L. Ca. 806. This reasoning is not, however, conclusive. The subsequent presentations would be more valuable not because of the charge, but because the house was in good repair. The purchaser probably knew the condition of the house; he had seen it.

On the sale of a house standing on less than one-eighth of an acre, and in a residential neighbourhood, the omission to state a restrictive covenant against using the land as gasworks is an immaterial omission: *semble*, *Higgins & Hitchman's Contract*, 21 Ch. D. 95.

If there are no minerals, the omission to mention that the vendor is not entitled to the minerals is immaterial: *Lyddal v. Weston*, 2 Atk. 19. If there are no minerals, the fact that the land is subject to rights of mining vested in other persons is also, it seems, immaterial: see *Martin v. Cotter*, 3 J. & L. 496, at p. 509.

CHAPTER IV.

INDUSTRIOUS CONCEALMENT OF AND MISREPRESENTATION CONCERNING A PATENT DEFECT.

If the vendor intentionally diverts the purchaser's attention from or industriously conceals a patent defect, the purchaser will be relieved: *Shirley v. Stratton*, 1 Bro. Ch. C. 440. Concealment
by vendor.

The following are instances of industrious concealment:— Examples.

Papering over a defect in a wall: per Gibbs, J., in *Pickering v. Dowson*, 4 Taunt. at p. 785.

Removing a ship from the ways on which she lay dry, and keeping her afloat so as to conceal the bottom, which was worm-eaten, and the keel, which was broken: *Schneider v. Heath*, 3 Campb. 506.

There is no "industrious concealment" in a mere promise by the vendor to have the foundations of a cracked wall examined, if the purchaser takes possession without asking the vendor if the examination has been actually made: *Cook v. Waugh*, 2 Giff. 201 (a case of agreement to grant a lease).

The purchaser will be entitled to relief even for a patent defect if the vendor have made a positive misrepresentation on the point. Misrepresentation.

"The maxim *caveat emptor* . . . does not apply where there is a positive representation essentially material to the subject in question, and which at the same time is false in fact. I must consider any fundamental mistake in the particulars of an estate as furnishing a case in which the purchaser will be entitled to have the mistake set right:" per Lord Thurlow, in *Loundes v. Lane*, 2 Cox, 363. "If a man makes a description calculated to mislead, I do not think it is well for him to say, 'If you had been very careful, you would have found out the blunder.' How was it that he did not himself find it out?" per James, L. J., in *Re Arnold*, 14 Ch. Div. 270, at p. 281.

Examples.

A representation by the vendor that the house is substantial and well-built, relieves the purchaser from the necessity of inspecting the house for himself, and though the defect is patent the purchaser will be entitled to relief: *Cox v. Middleton*, 2 Drew. 209.

Where property measuring thirty-three feet in depth was described as being forty-six feet in depth, the purchaser was relieved, although, being in occupation of the premises, he could have easily discovered the real measurement: *King v. Wilson*, 6 Beav. 124.

Where the purchaser, seeing stains on the walls and other signs of damp, was satisfied with the vendor's explanation that it was caused by the overflow from a gutter at the top of the house, and that the house was not damp, the purchaser was held entitled to relief on it being proved that the house was permanently damp: *Strangways v. Bishop*, 29 L. T. 120.

A house was subject to dry-rot. The vendor misrepresented the state of repairs, and the purchaser relied on the vendor's representation, telling the vendor that he had not had the premises surveyed, because he relied on him. The purchaser was relieved: *Grant v. Munt*, G. Coop. 173. The dry-rot in that case was not perfectly visible, and so probably would have been regarded as a latent defect, and the purchaser would have been relieved even in the absence of a positive misrepresentation.

A fault in a mine was concealed, being blocked up with rubbish. The purchaser (or his agent), before inspecting the mine, had asked, "Is there any fault in the mine?" to which the vendor had answered, "God knows; if you go down you will see all that I know." On seeing the rubbish which concealed the fault the purchaser asked, "What is the meaning of this rubbish; why do you not get the coal found in that direction?" and was answered, "We do not wish to work in that direction; we have got quite coal enough." It appears that the purchaser would have been entitled to relief had he not subsequently waived his right by his conduct: *Small v. Attwood*, You. 407, at p. 490; 6 Cl. & F. 232, see p. 357.

Where a representation is made by the vendor as to repairs, or the state of cultivation, the purchaser is not bound to make

such a minute inspection of the property as if there had been no representation: *Dyer v. Hargrave*, 10 Ves. 505, at p. 509. *Qu.* does it not absolve the purchaser from the necessity of making *any* inspection of the property as to repairs or state of cultivation? See above, p. 44, *Cox v. Middleton*, 2 Drew. 209.

Where the plan furnished by the vendor at the sale did not disclose a footway over the property, this was held to be a misrepresentation entitling the purchaser to relief, notwithstanding that a footway is a patent defect: *Dykes v. Blake*, 4 Bing. N. C. 463. (The vendor there also described the land as "building land.")

The misrepresentation may be implied from the nature of the property as described by the vendor, or from the nature of the agreement itself. Implied misrepresentation.

If the vendor describes the property as "building land," this implies a representation that the property is fit for the purpose of building on, and if there is an adverse right of way across the property, or anything else which makes the land useless or less valuable for building purposes, the purchaser will be entitled to rescind (or obtain compensation) if he have relied on the representation, notwithstanding that the defect is patent: *Dykes v. Blake*, 4 Bing. N. C. 463. In *Shackleton v. Sutcliffe*, 1 De G. & Sm. 609, the defect was a right of water-way which, even if the property had not been described as "building land," would have been sufficient to entitle the purchaser to relief, as being a latent defect.

A misrepresentation by the vendor does not entitle the purchaser to relief if he was not deceived. See Ch. VI., p. 49. Purchaser not deceived. Where a farm, consisting of scattered fields, was described as "lying within a ring-fence," and the purchaser saw the farm before the contract, the Court concluded that the purchaser knew the representation to be untrue. *Dyer v. Hargrave*, 10 Ves. 505. Grant, M. R., seems in that case to have thought, that as the variance was an "object of sense," the purchaser must have discovered it (see p. 508). But unless the Court came to the conclusion, as a matter of fact, that the purchaser did see that the farm was not in a ring-fence, it would seem wrong to hold that because he ought to have seen it he was precluded from objecting.

CHAPTER V.

AMBIGUITY.

Definition. AN ambiguity is a statement which is literally true, but which is susceptible of another meaning, which other meaning is one which might easily occur to a person of ordinary sense exercising ordinary care.

If the true meaning is one which would not be likely to occur to a person of ordinary sense as a possible meaning, the statement is more than a mere ambiguity—it is a misleading statement or misrepresentation (see p. 19).

If the other or untrue meaning is one not likely to occur to a person of ordinary sense exercising ordinary care, then the fact that the statement is capable of being misconstrued by an extraordinarily stupid or careless person does not make it an ambiguity. The phrases used to express this are necessarily vague: “reasonably capable of misconstruction” in *Seaton v. Mapp* (2 Coll. 556, Knight-Bruce, V.-C.); “a matter on which a person might *bonâ fide* make a mistake” (*Swaishland v. Dearsley*, 29 Beav. 430); “in the apprehension of ordinary persons” (*Taylor v. Martindale*, 1 Y. & C. C. C. at p. 663); and conversely, “if no man with his senses about him could have misapprehended” (*Swaishland v. Dearsley*, 29 Beav. 430, at p. 433, Romilly, M. R., cited with approval by Baggallay, L. J., in *Tamplin v. James*, 15 Ch. Div. 215).

Purchaser must say how he understood it.

If the purchaser complains of an ambiguity, he must tell the Court in what sense he understood it: see *Smith v. Chadwick*, 9 App. Ca. 187, which was the case of a misrepresentation in the prospectus of a company. There the misrepresentation complained of was, “the present value in the turnover or output of the entire works is over one million sterling per annum.” The plaintiff, on being asked what meaning he attached to these words, replied: “I understand the meaning of such misrepre-

sentations to be that which the words composing them obviously convey, and I am unable to express in any other words what I understood to be the meaning thereof." His action was dismissed.

So, too, in *Vignolles v. Boicen*, 12 Ir. Eq. 194, where the purchaser in his affidavit merely submitted to the Court that the true construction of the particulars was so and so, but did not say positively that he was misled: see p. 198 of the report.

The purchaser must swear that he was misled, and he may be contradicted: *Suaisland v. Dearsley*, 29 Beav. 430. If the purchaser is proved to have known the true state of the facts, he will not be entitled to relief: see p. 54. This proof may be established by parol evidence. So also, if the purchaser was deceived, but the mistake did not influence his choice, he cannot complain: see p. 62.

A general term is not necessarily an ambiguity. "An ex- General term.
pression is only ambiguous when from its very terms it may mean either one thing or another; and it is an improper use of the word to say that an expression is ambiguous when a *nomen generale* is used, and the doubt is which of several things is included in it. If a person agrees to sell 'a horse,' there is no ambiguity in the expression, although it is uncertain whether the horse is of one sex or the other. In like manner, the term 'equitable interest' cannot be said to be ambiguous because it may mean one or another description of equitable interest. Where a *nomen generale* is used, if the purchaser wishes to know what description of matter is meant to be included, he ought to inquire." Per Pollock, C. B., in *Ashworth v. Mounsey*, 9 Exch. 175, at p. 186.

The following cases exemplify what are ambiguous descriptions and what not:—

The description of an underlease as a "lease" is an ambiguity "Lease."
amounting to a misdescription, and entitling the purchaser to relief, unless he knew or had notice of the fact that he was only to get an underlease: *Madeley v. Booth*, 2 De G. & S. 718. A dictum of Jessel, M. R., in *Camberwell, &c. Society v. Holloway*, 13 Ch. D. at p. 760, dissenting from *Madeley v. Booth*, has been disapproved by the Court of Appeal in *Beyfus & Masters*, 39 Ch. Div. 110.

The expression "derivative lease," used to describe an underlease of property which is part only of property comprised in the superior lease, is ambiguous, as it might be taken to mean simply an underlease: *Bromfit v. Morton*, 3 Jur. N. S. 1198.

The expression "the vendor's interest in the lease held by him of —" is not a misdescription, even though the vendor has only an underlease: *Waring v. Scotland*, 59 L. T. N. S. 132.

Where land in Ireland was described as held by lease "for three lives and thirty-one years," being really held for three lives and so many of the thirty-one years as should be unexpired at the death of the surviving life, it was held that there was no ambiguity, such tenure being frequent in Ireland: *Vignolles v. Bowen*, 12 Ir. Eq. 194. It also appears that the purchaser's evidence as to his having been misled was not sufficient: see pp. 198 and 199 of that report.

The words "held for the remainder of a term of fifty-four years" are ambiguous, and their obvious meaning would seem to be that fifty-four years, the remainder of an unnamed term, was being sold, and not an unnamed term the remainder of an original term of fifty-four years: *Gardiner v. Tate*, 10 L. R. Ir. 460, at p. 474.

Ambiguity
corrected by
other state-
ments.

In the case of a mistake caused by a mere ambiguity, the vendor is entitled to rely on any statements in the particulars or conditions from which the purchaser could have inferred the truth.

Thus, where an underlease was described as a "lease," but the conditions mentioned an outstanding term of three days, and referred to the lease, and stated that "the purchaser shall be deemed to have bought with full notice" of everything contained in the lease, and the lease contained a covenant by the lessee to permit "the superior landlord" to enter, it was held that the ambiguity of the word "lease" was cured by the conditions: *Camberwell case*, 13 Ch. D. 754.

The same rule as to an ambiguity applies in the case of misrepresentation in the prospectus of a company; the statement, if merely ambiguous, may be corrected by a reference to the articles of association: *Hallows v. Fernie*, 3 Ch. 467.

CHAPTER VI.

MISDESCRIPTION DANS LOCUM CONTRACTUI.

THE purchaser cannot complain of the misdescription (1) if he was not deceived by it, or (2) if he was not induced by it either to purchase something which he would not otherwise have purchased, or to give a higher price than he would have given had he not been deceived.

"When I say that a vendor who makes a representation that is untrue cannot enforce his contract, that, of course, supposes that the purchaser is deceived; if the purchaser knows at the time that the representation is untrue, he is not deceived, and cannot in that case avail himself of the fact that there has been misrepresentation": per Wigram, V.-C., in *Lord Brooke v. Rounthwaite*, 5 Hare, 298. Purchaser not deceived.

In *Attwood v. Small*, 6 Cl. & F. 232, at p. 444, Lord Brougham, in describing the nature of misrepresentation against which the Court will grant relief, says: "It should be this false representation which gave rise to the contracting of the other party. *Dolus dans locum contractui* is the language of the civil law, not *dolus malus* generally; not the mere fraudulent conduct of the party trying to overreach his adversary, not mere misconduct and falsehood throughout, unless *dedit locum contractui*." *Dolus dans locum contractui.*
(P. 448) "If a mere general intention to overreach were enough, I hardly know a contract, even between persons of very strict morality, that could stand; we generally find the case to be that there has been an attempt of the one party to overreach the other, and of the other to overreach the first, but that does not make void the contract. It must be shown that the attempt was made, and made with success, *cum fructu*. The party must not only have been minded to overreach, but he must actually have overreached. He must not only have given instructions to the agent to deceive, but the agent must, in fulfilment of his

directions, have made a representation; and, moreover, the representation so made must have had the effect of deceiving the purchaser; and, moreover, the purchaser must have trusted to that representation, and not to his own acumen, not to his own perspicacity, not to inquiries of his own. I will not say that the two might not be mixed up together, the false representation of the seller and the inquiries of the buyer, in such a way as even then to give a right to relief."

Burden of
proof.

If a misdescription has been made, the burden of proof (except in the cases mentioned below of an ambiguity and a misdescription which is *prima facie* immaterial) lies on the vendor to prove that the purchaser was not deceived, or did not rely on the description, or was not induced by it to enter into the purchase or to give a higher price. "Where false representations are made for the purpose of inducing a purchase, it is, in my opinion, incumbent upon those who claim the benefit of the purchase to prove to demonstration that those representations were not acted on": per Turner, L. J., in *Nicol's case*, 3 De G. & J. 387.

It has even been said that where a misrepresentation material on the face of it has been made, it is an inference of law that the purchaser was induced by it to enter into the contract. But this is putting the case too high. Probably all that was meant was that the Court would not require further proof from the purchaser, though it would allow the vendor to prove that the purchaser was *not* induced by the representation.

"If it is a material representation calculated to induce him to enter into the contract, it is an inference of law that he was induced by the representation to enter into it, and in order to take away his title to be relieved from the contract on the ground that the representation was untrue, it must be shown either that he had knowledge of the facts contrary to the representation, or that he stated in terms or showed clearly by his conduct that he did not rely on the representation": per Jessel, M. R., in *Redgrave v. Hurd*, 20 Ch. Div. 1, at p. 21, and quoted by him with approval in *Matthias v. Yette*, 46 L. T. N. S. 497, at p. 502. But in *Smith v. Land Corporation*, 28 Ch. Div. 7, at p. 16, Bowen, L. J., says: "I cannot quite agree with the

remark of the late Master of the Rolls in *Redgrave v. Hurd*, that if a material representation calculated to induce a person to enter into a contract is made to him, it is an inference of law that he was induced by the representation to enter, and I think that probably his lordship hardly intended to go so far as that, though there may be strong reason for drawing such an inference as an inference of fact."

In *Smith v. Chadwick*, 9 App. Ca. 187, at p. 196, Lord Blackburn says: "If it is proved that the defendants, with a view to induce the plaintiff to enter into a contract, made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement. In *Redgrave v. Hurd* (20 Ch. Div. 21), the late Master of the Rolls is reported to have said it was an inference of law. If he really meant this he retracts it in his observations in the present case. I think it not possible to maintain that it is an inference of law." Jessel, M. R.'s, observations in *Smith v. Chadwick* are as follows (see 20 Ch. Div. at p. 44):—"On the question of the materiality of the statement, if the Court sees on the face of it that it is of such a nature as would induce a person to enter into the contract, or would tend to induce him to do so, or that it would be a part of the inducement to enter into the contract, the inference is, if he entered into the contract, that he acted on the inducement so held out, and you want no evidence that he did so act; but even then you may show that in fact he did not so act in one of two ways, either by showing that he knew the truth before he entered into the contract, and therefore could not rely on the mis-statements; or else by showing that he avowedly did not rely upon them, whether he knew the facts or not. He may by contract have bound himself not to rely upon them, that is, to take the matter at his own risk whether they were true or false (which was the conclusion to which the House of Lords came in the recent case of *Brownlie v. Campbell*, 5 App. Ca. 925), or he may state that he did not rely upon them in the witness box. But, unless it is shown in one way or the other that he did not rely on the statement, the inference follows."

Ambiguity. If the misdescription complained of is a mere ambiguity, it is not sufficient for the purchaser to show that the words have two meanings, he must say in what sense he understood them. "If the plaintiff will not tell us what he relied on, if he says to the Court 'please find out the meaning. I relied on the statements in the prospectus and I relied on them according to their meaning, whatever their meaning is,' surely that will not do. How can the Court find out that he has been deceived at all": per Jessel, M. R., in *Smith v. Chadwick*, 20 Ch. Div. 27, at p. 45.

Not obviously
material.

A material misdescription is one calculated to enhance the value of the property in the eyes of any ordinary purchaser. If the misdescription is not obviously material, much more if it is of such a kind as to make the property seem to an ordinary purchaser less valuable than it is in reality, the *onus* lies on the purchaser to prove that the misdescription was material to *him*.

Examples. On the sale of land subject to a lease for twenty-one years of which fifteen years only remained to run, the lease was described as a lease for seventeen years, and the vendor omitted to state that the lease was determinable at the end of seven or fourteen years. The purchaser complained of the misdescription, but as he failed to show any special reason for desiring the lease to continue for the full period, and was unable to prove that the property was less valuable on account of the lease being shorter than described, or being determinable, no relief was granted: *Goddard v. Jeffreys*, 51 L. J. Ch. 57.

The existence of a little dry-rot in the floor of a house situate in a clayey soil is an immaterial defect, a "mere bagatelle": *Bowles v. Atkinson*, Sug. 334.

Where the vendor of a house described it as leased to A., and could only give the purchaser the benefit of a lease to Lord B., the purchaser, who could not show that Lord B. was a less desirable tenant than A., was held not entitled to relief for the misdescription: *Grissell v. Peto*, 2 Sm. & G. 39.

But for the decision of Romilly, M. R., in *Ayles v. Cor*, 16 Beav. 23, the description of freehold land as "copyhold" would seem to be immaterial, as freehold is more valuable than copyhold; but that judge held that the description was not only

material but essential, and that the *onus* lay on the vendor to prove that it was not essential to the purchaser. See p. 106, below.

It has been said that the want of a few days at the end of a term of ninety-nine years—as in the case of a contract to sell a lease for ninety-nine years, the vendor having only an underlease for that term, less three days—is not necessarily too trivial a difference to be a ground for resisting specific performance. See *Darlington v. Hamilton*, Kay, 550; per Page-Wood, V.-C., commenting on *Madeley v. Booth*, 2 De G. & Sm. 718. But perhaps it would be more correct to treat the matter as a defect in title, which is necessarily material.

On the sale of a manor it was stated in the particulars that the fines were arbitrary, whereas in fact some fines were certain. ^{Arbitrary fines.} Amongst other reasons for refusing relief to the purchaser, it was said that the statement that the fines were arbitrary was not sufficient for the purchaser to form his resolution as to the value without further inquiry as to what the fines were, since an arbitrary fine is not necessarily greater than a fine certain: *White v. Cuddon*, 8 Cl. & F. 766, at p. 785.

The case of a misstatement of acreage is obviously a material ^{Acreage.} misdescription, and the burden of proof would lie on the vendor to show that the purchaser did not rely on it. "Though the land is neither bought nor sold professedly by the acre, the presumption is that in fixing the price regard was had on both sides to the quantity": per Grant, M. R., in *Hill v. Buckley*, 17 Ves. 394. In *Leslie v. Thompson*, 9 Hare, 268, Turner, V.-C., says, "The actual designation of the number of acres negatives the presumption of any intention on the part of the vendor to sell in the lump." But it is difficult to see what difference the *vendor's* intention makes; it is the purchaser's intention that is really in dispute in these cases.

On the sale of an underlease the vendor described the im- ^{Rental.} proved rent to which the underlease was subject as a "ground rent," but also mentioned the true value of the rack-rent. It was held that this description was, on the whole, not calculated to deceive, since the value of the property being given correctly, and the amount of the improved rent being also correctly stated,

the application of the term "ground rent" to the improved rent was an immaterial misdescription: *Bartlett v. Salmon*, 6 D. M. & G. 33.

The vendor may prove that the purchaser either (1) knew the true facts, or (2) did not rely on, or (3) was not influenced by, the misdescription.

Purchaser's knowledge.

(1) The vendor may prove the purchaser's knowledge of the facts.

Examples.

In a contract to sell a house, not stating the nature of the vendor's interest, if the purchaser knows that the vendor is entitled only to a lease and not to the fee, he cannot resist specific performance on the ground that the vendor did not state this in the contract: *Cowley v. Watts*, 17 Jur. 172.

Where an underlease is described as a lease, the purchaser is not entitled to relief on account of the ambiguity if he knew beforehand that the vendor had only an underlease: *Henderson v. Hudson*, 15 W. R. 860.

Where the vendor agreed to sell a "lease," having only a contract for an underlease, the purchaser, who has seen the contract for the underlease under such circumstances that he must have known he was only to have an underlease, will be bound to accept an assignment of an underlease made in accordance with the terms of such contract: *Flood v. Pritchard*, 40 L. T. N. S. 873.

Where the misrepresentation complained of was that the statement as to the produce of the woods was misleading, because such produce had only been made by cutting in an unhusbandmanlike manner, the purchaser was held unable to complain of the misrepresentation, because he had sent his own surveyors down, and they found out that the woods had been cut improperly, and therefore the purchaser was not misled by the statement as to the produce of the woods: *Loundes v. Lane*, 2 Cox, 363.

On the sale of an estate comprising a house, cultivated land, and 100 acres of heath, worth about 1*l.* an acre, the latter was described as "about 200 acres, more or less, of mountain land"; but as the vendor took the purchaser over the land before the sale, and pointed out to him correctly what he was to get, it was

held that the purchaser could not complain of the misdescription:

Corless v. Sparkling, I. R. 9 Eq. 595.

But in the case of a defect in the title, if the contract contains an express agreement to make a good title, this nullifies the effect of the purchaser's knowledge that the vendor's title is defective: see below, p. 210.

Defect in title.

The purchaser's knowledge of the facts may be inferred from the circumstances, even though he denies knowledge.

Knowledge inferred.

The fact that the purchaser had attended a previous abortive sale by auction, where the particulars described the property as leasehold, was considered as proving that the purchaser knew that the vendor, who contracted to sell "my house," not mentioning the tenure, had a lease only, and not the fee (*Coxley v. Watts*, 17 Jur. 172); though it is not clear that the purchaser disputed that he had gained such knowledge at the auction sale.

Tenure.

Knowledge of an incumbrance affecting the property, but not mentioned in the particulars, was not inferred from the fact that at the sale by auction, at which the purchaser bought the property, the conditions of sale mentioning the incumbrance were read aloud, the purchaser swearing that he was seventy-three years old, very deaf, and unable to hear the conditions, and that he did not inquire about them, thinking they were only formal: *Torrance v. Bolton*, 8 Ch. App. 118.

Incumbrances.

Knowledge that the land is subject to water-rights will not be presumed from the fact that the purchaser lived in the neighbourhood, was acquainted with the property, and constantly passed some wells supplied from the land contracted to be sold: *Shackleton v. Sutcliffe*, 1 De G. & S. 609.

Waterway.

Knowledge of the acreage of the property will not be presumed from the fact that the purchaser knew the property: *Ibid*.

Acreage.

Knowledge of the dimensions of a house will not be presumed from the fact that the purchaser was the tenant and occupier of the house: *King v. Wilson*, 6 Beav. 124.

Dimensions.

Where property was described as lying "within a ring-fence," but was in fact dispersed, the Court inferred that the purchaser knew the true facts, because he had lived in the neighbourhood all his life. "This variance is the object of sense. He must have known whether the farm did lie in a ring-fence or not."

"Ring-fence."

Thirty or forty acres more than he was purchasing" (150 acres) "would have been noticed by him He had repeated opportunities of going over the farm": *Dyer v. Hargrave*, 10 Ves. 505; *sed qu.*

"Insurable life."

Where the particulars stated that a person was "a healthy gentleman, aged forty-eight, whose life is insurable," the fact being that the insurance companies required a higher rate than the highest rate of insurance of a healthy life of the same age, the purchaser was not presumed to know the true state of the case, merely because there was a statement in the particulars that the vendor guaranteed the insurance at five guineas per cent., which, to the knowledge of the purchaser, was more than the usual premium: *Brealey v. Collins*, You. 317.

Purchaser not relying on statement.

(2) The vendor may show that the purchaser did not rely on the vendor's statements, but trusted to his own knowledge or supposed knowledge of the property. "If the party to whom the representations were made himself resorted to the proper means of verification before he entered into the contract, it may appear that he relied upon the result of his own investigation and inquiry, and not upon the representations made to him by the other party": per Lord Langdale, M. R., in *Clapham v. Shillito*, 7 Beav. 146.

In one case, although there was a clear misrepresentation by the vendor, the Court came to the conclusion that the purchaser relied on his own knowledge and not on the misrepresentation. Property let for 100*l.*, the landlord paying the rates and taxes, which amounted to 16*l.* 9*s.*, was put up for sale as let at 100*l.* "clear of taxes and rates." The purchaser, who was an auctioneer, asked no questions about the rates and taxes, assuming that the tenant paid them as that was the practice in London where the property was situate. In an action of deceit against the vendor, the Court held that the purchaser did not rely on the misrepresentation "but grounded himself upon a supposed knowledge of the usual course of practice in such transactions": *Wilson v. Fuller*, 3 Q. B. 68, see p. 78 (the head note does not accurately represent the real ground of decision). This case is, however, open to grave doubt, as the direct misstatement as to the taxes could not but have influenced the purchaser.

It is sometimes said, that if the purchaser has resort to other means of information, he ought not to rely, and must be taken not to have relied, on the vendor's statements, and that if he inquired but inquired carelessly, he must bear the consequences of his own negligence. Resort to other means of knowledge.

Thus, Stuart, V.-C., says, in *Clarke v. Mackintosh*, 4 Giff. 134, at p. 155, "There is no doubt that if the purchasers could show that they contracted to buy in absolute and express reliance on the truth of representations which turn out to be false, and without resort to other means of information by which the truth might be sufficiently disclosed, they ought not to be compelled to perform the contract. But a purchaser is bound to exercise a reasonable degree of caution. Therefore, if there be anything in the nature or circumstances of the representations made by the vendors calculated to excite suspicion or to require explanation or investigation, the purchaser is bound to be on his guard, and must bear the consequences of any negligence on his own part; much more if the purchaser, not satisfied with the representations, proceeds to investigate and inquire for himself, and has the fair opportunity of testing the accuracy of what the seller has represented, he must abide by the consequences and the seller in general is relieved from responsibility"—(and at p. 157) "When the purchasers took upon themselves to investigate, and had a full and fair opportunity to test the accuracy of what had been represented by the seller, it is no excuse to say that the investigation made by themselves was loosely or carelessly made or that their solicitor acted in a cursory manner."

So, too, the judgments in *Attwood v. Small*, 6 Cl. & F. 232, the headnote of which case contains the following summary: "If a purchaser choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him or to his agents, he cannot be heard to say he was deceived by the vendor's representations, the rule being *caveat emptor*, and the knowledge of his agents being as binding on him as his own knowledge."

In *Clapham v. Shillito*, 7 Beav. 146, Lord Langdale says: "If the means of investigation and verification be at hand, and the

attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to make it incumbent on a court of justice to impute to him a knowledge of the result, which upon due inquiry he ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded."

Misrepresentation.

But if the vendor have made a positive misrepresentation and in the language of the Courts committed "legal fraud," it is quite clear that the non-inquiry or insufficient inquiry of the purchaser does not preclude him from relief on the ground of the vendor's misdescription. "In no way, as it appears to me, does the decision, or any of the grounds of decision, in *Attwood v. Small* support the proposition that it is a good defence to an action for rescission of a contract on the ground of fraud that the man who comes to set aside the contract inquired to a certain extent, but did it carelessly and inefficiently, and would, if he had used reasonable diligence, have discovered the fraud": per Jessel, M. R., in *Redgrave v. Hurd*, 20 Ch. Div. 1, at p. 17.

"The vendor cannot say you might have inquired, and then you would have found out I told you a lie": per Jessel, M. R., in *Matthias v. Yetts*, 46 L. T. N. S. 497. There the purchaser made a partial inquiry, but as the inquiry did not disclose the true state of the facts the purchaser was allowed to rescind on the ground of the vendor's misrepresentation.

Fraud.

Much less can the vendor rely on the facilities given by him to the purchaser for discovering the truth, if he have *intentionally* misled the purchaser. "In such a case it is no answer to the charge of imputed fraud to say that the party alleged to be guilty of it recommended the other to take advice, or even put into his hands the means of discovering the truth. However negligent the party may have been to whom the incorrect statement has been made, yet that is a matter affording no ground of defence to the other. No man can complain that another has too implicitly relied on the truth of what he has himself stated": per Lord Cranworth in *Reynell v. Sprye*, 1 D. M. & G. 660, at p. 710.

Inconsistent statements.

Where, however, the vendors made various and inconsistent representations as to the profits of the brewery which they were

selling, but gave the purchaser every facility for investigation, it was held that the inconsistency of the statements put the purchaser on inquiry: *Clarke v. Mackintosh*, 4 Giff. 134. It is probable that in that case the Court believed as a fact that the purchaser was not misled.

If it is proved that the purchaser knew the representation was partially untrue, the Court may infer that he did not rely upon the statement at all. Where the defendant described the property as standing "on a fine vein of anthracite coal, the finest vein of South Wales," and omitted to state that the vein had been partially worked and was almost exhausted, the purchaser, who knew that the coal had been partially worked, was held to be disentitled to relief for the misdescription, on the ground that he knew the description was false to a certain extent, and was therefore put on inquiry as to the extent to which the description was true: *Colby v. Gadsden*, 34 Beav. 416.

In judging whether the purchaser relied upon the representation, the Court takes into account the opportunities which the purchaser had of judging for himself, the inspection which he actually made, the fact that he was by special education, or the circumstances of his business or profession, qualified to judge, or that he employed professional advice. The Court also considers the subject-matter, whether the vendor was or was not likely to know more about it than the purchaser, and whether inspection would be calculated to inform the purchaser of the true facts or not.

Purchaser's
opportunities.

"When we are endeavouring to ascertain what reliance was placed on representations, we must consider them with reference to the subject-matter and the relative knowledge of the parties. If the subject is capable of being accurately known, and one party is, or is supposed to be, possessed of accurate knowledge, and the other is entirely ignorant, and a contract is entered into after representations made by the party who knows, or is supposed to know, without any means of verification being resorted to by the other, it may well enough be presumed that the ignorant man relied on the statements made by him who was supposed to be better informed. But if the subject-matter is in its nature uncertain, if all that is known about it is matter of

inference from something else, and if the parties making and receiving representations on the subject have equal knowledge, and means of acquiring knowledge, and equal skill, it is not easy to presume that representations made by one would have much, or any, influence upon the other": per Lord Langdale, M. R., in *Clapham v. Shillito*, 7 Beav. 146.

In *Jennings v. Broughton*, 5 D. M. & G. 126, which was a case of a purchaser of shares in a mine seeking relief on the ground of misrepresentation of the character of the mine, Turner, L. J., after referring to a representation that in a particular level the lode showed a body of solid ore resting on the vein, three feet wide, largely intermixed with lumps of ore and calamine, and continuing to maintain the same width and characteristics to the extent of the workings, being seventeen yards further, says: "I find no evidence to warrant this statement. . . . But to say that these statements in the report were not well-founded is one thing; to say that the plaintiff was deceived by those statements, or was induced by them to purchase these shares, is another thing. Looking at the character which the plaintiff gives of himself, and which is given of him by his witnesses, I think it impossible to believe that he could have been at all induced to purchase these shares by the statement of there being lumps of calamine in this level. And with respect to the lode continuing to maintain the same width and characteristics, the plaintiff was twice at the mine, once before he purchased any shares, and the second time in the interval between his two purchases; and, however ignorant he may be of mining, he must at least have been capable of seeing whether the vein had or had not been laid open behind the point where the solid ore was presented to his view. If it had, he must have known what were its characteristics. If (as was the fact) it had not, he must have known that this statement could only be matter of speculation, and not of certainty." This passage is quoted with approval by Lord Hatherley in *Higgins v. Samels*, 2 J. & H. 465.

Special
knowledge.

The purchaser's profession, and therefore special knowledge, is often a material fact in determining whether he was misled.

In *Hallows v. Fernie*, 3 Ch. App. 467, which was a case of a

purchase of shares in a shipping company, the fact that the purchaser was a shipping agent and secretary to a company was considered important. See p. 477 of the Report.

There are *dicta* in *Haywood v. Cope*, 25 Beav. 140, which seem to lay down the principle that if a purchaser has not the requisite special knowledge, he ought to employ someone who has. "He says he had no knowledge of mines and coal. . . . He ought, then, to have employed some person who had a proper knowledge for that purpose (which I believe he did). It would be no excuse for a man who had himself personally inspected a house for the purpose of seeing whether it was in a proper state of repair, afterwards to contradict his own judgment on the ground that he was not a surveyor, and was unable to say whether the house was in a sufficient state of repair or not." The correctness of these remarks may perhaps be doubted. The question is not ought the purchaser to have known, but did he know. In the case of a patent defect, or of notice (see Chaps. III. and VII.), it is immaterial whether the purchaser knew or not, but in other cases of defects in the condition of the property, or of misdescription by the vendor, the question of the purchaser's knowledge is a question of fact, not of presumption.

If the investigation made by the purchaser could not correct the misrepresentation, the fact that the purchaser investigated does not relieve the vendor from the consequences of his misrepresentation. Investigation inadequate.

Thus, where the purchaser, who was a lime-dealer or stonemason, went with another person who was something of a chemist and something of an architect, to inspect a lime quarry, their inspection did not fix the purchaser with notice that the lime was not of the quality described in the particulars of sale, because lime cannot be judged till it is burnt: *Higgins v. Samels*, 2 J. & H. 460.

It is not necessary for the purchaser to prove that he relied solely upon the misrepresentation. In *Nicol's case*, 3 De G. & J. 387, where a shareholder in a joint stock bank sought to have his name struck out of the list of contributories on the ground that he was induced to accept the shares by the misrepresentation of the directors, Lord Chelmsford says (p. 422), "Sup- Reliance on misrepresentation alone,

posing, however, that the reports and other statements of the directors formed a material part of the inducement to take the shares, without which the purchase would never have been made, I cannot think that the effect of them is destroyed because other influences were at the same time at work, which either innocently or intentionally contributed to the success of those false representations." See also the remarks of Lord Justice Turner, at p. 439, and *Edgington v. Fitzmaurice*, 29 Ch. Div. 459.

Purchaser not
influenced.

(3) The vendor may prove that the purchaser was not influenced by the misdescription, or induced by it to buy what he would not have bought had he known the facts, or to give a higher price than he would otherwise have given. It is quite clear that if the purchaser would have given the same price in any event he cannot complain that he has suffered loss by reason of the misdescription. The difficulty in such a case would, of course, be to prove the fact.

Where the purchaser endeavoured to resist specific performance of a contract to buy "the interest" of the vendor in certain lands, on the ground that the vendor's agent had assured him the vendor had a good title, the Court held that the fact that the purchaser desired to buy out the vendor in order to remove his opposition to a bill in Parliament, showed that it was not the agent's representation which induced the purchaser to make the contract: *Hume v. Peacock*, 1 Ch. 379.

In *Whittemore v. Whittemore*, 8 Eq. 603, Malins, V.-C., gave the purchaser compensation for a deficiency in quantity although he was "firmly persuaded that the purchaser would have given the same price for the property if those words" (the false description) "had been omitted." There was an affidavit by the purchaser that he would not have given so much if he had known the actual area. It is submitted that in spite of the strong assertion quoted above the Vice-Chancellor did believe this affidavit, or at all events thought that the vendor's proof to the contrary was insufficient. If not, it is submitted that compensation ought not to have been given to the purchaser.

Motive for
rescinding.

If the misrepresentation was material (see p. 52), the purchaser's motive for resisting specific performance is not regarded as relevant to the question whether he did or did not rely on the

misrepresentation: *Denny v. Hancock*, 6 Ch. App. 1. See also, *Brooke v. Rounthuaité*, 5 Ha. 298, at p. 302. If the misrepresentation was one which would usually be regarded as immaterial, and the purchaser's own evidence is the sole proof that the misrepresentation complained of induced him to enter into the contract, the purchaser's motive for resisting specific performance is relevant as affecting the value of such evidence: see judgment of James, L. J., in *Denny v. Hancock*, 6 Ch. 1.

The principle that the misdescription must be one *dans locum contractui*, applies also to actions of deceit, *i.e.*, actions for damages for fraudulent misrepresentation. If a fraudulent misrepresentation is not believed in or relied upon, the person complaining of it will be unable to recover damages in an action of deceit. And if a statement, although untrue to the knowledge of the person making it, is so trivial that it could not, in the opinion of the Court, have influenced the conduct of the person complaining of it, it will not support an action of deceit: *Smith v. Chadwick*, 20 Ch. Div. 27, *affd.* 9 App. Ca. 187.

Actions of
deceit.

CHAPTER VII.

NOTICE.

IN the absence of any misrepresentation, or positive misstatement, the purchaser cannot complain that he was misled where he is fixed with notice of the true state of facts.

Of what
things pur-
chaser has
notice.

- (i.) The purchaser has notice of all patent defects in the condition of the property.
- (ii.) He has notice of all facts stated in the particulars, or in the plan incorporated with the agreement for sale, whether he has looked at them or not.
- (iii.) Where the misdescription complained of is at the most an ambiguity, the purchaser has notice of all facts stated in either the particulars or the conditions.
- (iv.) If the particulars mention that the property is subject to a lease, or that the vendor is selling a leasehold interest, and a reasonable opportunity of inspection of the lease or counterpart is offered, the purchaser has notice of the contents of the lease. A mere mention of the lease is not notice.
- (v.) If the particulars (or if, as to matters which need not be mentioned in the particulars, the conditions) expressly refer the purchaser to some other document for information, and reasonable opportunity is offered to inspect such document, the purchaser has notice of such information if contained in the document.
- (vi.) In other cases the purchaser is not affected with notice, unless he has actual knowledge.

Patent
defects.
Plan.

- (i.) *Notice of patent defects* : See Chap. III., p. 35.
- (ii.) *Notice of plan* : See Chap. XI., p. 94. It is not necessary to cite cases to show that the purchaser has notice of the

facts stated in the particulars. The object of the particulars is to describe the property, and if the purchaser does not read the particulars he has only himself to blame.

(iii.) *Notice of facts stated in the particulars and conditions* Ambiguity. *correcting an ambiguous description.*

If the misdescription complained of amounts only to an ambiguity (see p. 46), the vendor is entitled to rely on any statement contained either in the particulars or the conditions which would explain the ambiguity.

Thus, where an underlease was described as a "lease," but there was a condition referring the purchaser to the lease, and another condition mentioning an "outstanding term of three days," the purchaser was held to be affected with notice of the matters contained in the conditions which explained the ambiguity: *Camberwell, &c. Society v. Holloway*, 13 Ch. D. 754.

(iv.) *Notice of contents of lease.*

Notice of
lease.

"Where a purchaser has notice of a lease, it is his business to look at the clauses of it to see whether it materially influences his judgment in the purchase. I see no distinction between this case and those where the landlord sells and says that the property is under lease. If he do not state it to be so, he does not state the case so as to enable the purchaser to know what he is to purchase, and that is a misrepresentation. But where there are outstanding leases, it is the duty of the purchaser who has notice of them to ask and ascertain what the terms are upon which the property is out on lease, so that he may know precisely the nature of the property which he purchases, that is, whether he has certain rights upon it, or whether his rights are in any way restricted": Alderson, B., in *Pope v. Garland*, 4 Y. & C. 394, at p. 400.

The rule that notice of a lease is notice of its contents is stated in the broadest manner in *Hall v. Smith*, 14 Ves. 426. There Grant, M. R., says: "If the party has notice that the estate is in lease, he has notice of everything contained in the leases." Dart, p. 107, doubts whether the purchaser is affected with notice of "any matter in a lease which is not in its nature incidental to such an instrument." Wood, V.-C., in *Darlington v. Hamilton*, Kay, 550, at p. 556, questioned whether the doctrine of notice extended to collateral facts stated in the lease.

Contents of
lease.

Reference to a lease has been held to fix the purchaser with notice of the following matters contained in the lease :—

The amount of the ground rent, and the terms of some special covenants: *Pope v. Garland*, 4 You. & Coll. 394.

Covenants against noisome trades: *Grosrenor v. Green*, 28 L. J. Ch. 173.

A power for the tenant to cut the timber and sell it: *Vignolles v. Bowen*, 12 Ir. Eq. R. 194.

A covenant against alienation without licence: *Vaughan v. Magill*, 12 Ir. Eq. R. 200, 207; *Smith v. Capron*, 7 Ha. 185, at p. 189, where the purchaser saw the lease and an assignment thereof which was expressed to be made with the lessor's licence.

A purchaser of leaseholds, described as being held with others under one lease reserving rent, was held to have notice of a power of re-entry, which was contained in the lease and affected the whole of the premises: *Walter v. Maunde*, 1 Jac. & W. 181.

Mention of an annuity being charged on the property sold is sufficient notice of the existence of a term of years to secure such annuity: *Vaughan v. Magill*, 12 Ir. Eq. R. 207.

Derivative
lease.

The mere mention of the superior lease is not sufficient to affect the purchaser with notice that the underlease is an underlease of part only of the property comprised in the head-lease: *Taylor v. Martindale*, 1 Y. & C. C. C. 658. Even the statement that the underlease is a "derivative lease" is not sufficient to inform the purchaser that other property is comprised in the head-lease: *Bromfit v. Morton*, 3 Jur. N. S. 1198.

The case of the *Bank of Ireland v. Brookfield Linen Co.*, 15 L. R. Ir. 37, seems to conflict with the above cases, and if so is open to doubt. There, though no opportunity of inspection was given, the purchaser of a sub-fee farm grant (which is of the nature of an underlease) was held to be affected with notice of everything contained in the superior grant, and in particular with the fact that the land was, with other land, subject to the payment of head-rents and covenants, and provisoes for re-entry. The case was decided on the authority of *Cosser v. Collinge*, 3 M. & K. 283, where, however, an opportunity was given for examining the superior lease.

Reference in the *conditions* to a lease would seem not to be sufficient notice; the lease must be mentioned in the particulars. See *Jones v. Rimmer*, 14 Ch. Div. 588; see p. 68, below.

Lease mentioned in conditions.

Where the property sold was in the occupation of lessees for lives, and the particulars gave the names of the tenants, but not a description of their tenure, leaving a blank in the observation column opposite their names, it was held that the purchaser was affected with notice of their tenancy, and ought to have inquired what the tenure was, and that he was not entitled to conclude that they were tenants from year to year merely because other tenants in the same particulars were described as yearly tenants: *Martin v. Cotter*, 8 Ir. Eq. R. 147 (but qu.?). This case seems inconsistent with *Caballero v. Henty*, 9 Ch. 447, and *Hughes v. Jones*, 3 D. F. & J. 307; see below, p. 68.

Tenants named.

(v.) *Notice of documents generally.*

Other documents.

"If a property is sold subject to the provisions contained in a deed which is specially referred to without any mention of its contents, and which deed can be examined before the sale by the purchaser, he is bound by everything contained in that deed": per Romilly, M. R., in *Cox v. Coventon*, 31 Beav. 378.

"If the parties do not choose to look at documents placed before them to which they are referred, they cannot complain that they have not a perfect knowledge of the nature of the interest with which they are dealing": per Lord Cottenham in *Dawes v. Betts*, 12 Jur. 709.

But it is not sufficient, in order to fix the purchaser with notice of the contents of a lease or other document, that such document is simply stated in the particulars or conditions to exist: *Cox v. Coventon*, 31 Beav. 378.

Opportunity of inspection.

The purchaser is not fixed with notice of any document unless a reasonable opportunity of inspection is given him: *Reere v. Berridge*, 20 Q. B. Div. 523.

As to the sufficiency of the opportunity of inspection given to the purchaser, see *Brumfit v. Morton*, 3 Jur. N. S. 1198, where Stuart, V.-C., says: "When the parties met to sign the agreement the abstract was put into the hands of the clerk of the solicitor of the defendant under circumstances which made a

deliberate examination of it almost impossible. A deliberate examination, if required, and if time had been given for it, no doubt it was the right of the purchaser to demand; but I cannot look upon it that the production of the abstract of many documents in this case, each of which, in order well to understand the nature and contents of them, would require a very deliberate examination, affords such an opportunity as to justify the Court in considering that the purchaser must be held, according to the law of this Court, to have notice of all the contents of that abstract." The same rule applies to the case of a contract to grant an underlease: *Hyde v. Warden*, 3 Ex. Div. 72, p. 80.

Where
purchaser not
affected by
notice.

(vi.) Except in cases (i) to (v) inclusive, the purchaser is not affected with notice unless he has actual knowledge.

The following are instances of cases in which a purchaser is not affected with notice:—

The mention of incumbrances in the conditions of sale is not notice to the purchaser that the property is sold subject to the incumbrances; they must be mentioned in the particulars: *Torrance v. Bolton*, 8 Ch. 118.

Where the property is simply described as "held for the residue of a term of ——— years, from ———," and no mention is made of the rent in the particulars, a reference in the conditions to the lease under which the property is held, and a stipulation that he shall pay the rent and observe the conditions, is not notice of the fact that the property is subject to rent reserved by the lease: *Jones v. Rimmer*, 14 Ch. Div. 588.

A condition precluding the purchaser from objecting to a specified underlease, or any other underlease, or tenancy prior to the said underlease, does not affect the purchaser with notice of any underlease other than the one specified. See *Edwards v. Wickwar*, 1 Eq. 68.

Notice of a tenancy is not notice, as between the vendor and the purchaser, of the fact that the tenant has a lease: *Caballero v. Henty*, 9 Ch. 447. So, the statement that the property is "in the occupation of A. B. and others," is not notice that the property is subject to leases to these persons for lives: *Hughes v. Jones*, 3 D. F. & J. 307. The case of *Martin v. Cotter*, 8 Ir. Eq. R. 147, cited above (p. 67), is probably a wrong decision.

Knowledge or notice that the property is in the occupation of the vendor's mother is not, as between the vendor and purchaser, notice of the fact that she is tenant for life: *Nelthorpe v. Holgate*, 1 Coll. 203.

The lessee of a house purchasing the reversion is not held to have notice that the cellar is not the lessor's property, merely because it was not in the lessee's occupation: *Whittington v. Corder*, 16 Jur. 1034.

The purchaser is not affected with notice of a defect in the vendor's title simply because he resides in the neighbourhood, and the vendor's title is well known there: see *Pegler v. White*, 33 Beav. 403.

Notice of a covenant is not notice of the fact that the covenant has been broken: *Ellis v. Rogers*, 29 Ch. Div. 661.

The statement, on the sale of improved ground rents, that the original lease comprising other property contains certain restrictive covenants, is not notice of the fact that the lessee has already granted underleases of other parts not containing these restrictive covenants: see *Waring v. Hoggart*, Ry. & Moo. 39.

A statement on the sale of a life interest that the vendor guarantees the insurance of the life at the rate of 5 guineas per cent., a rate which the purchaser knew to be higher than the ordinary rate, is not sufficient to fix the purchaser with notice that the life is unhealthy: *Brealey v. Collins*, You. 317.

A statement in the particulars or conditions that the land has been enfranchised under the Copyhold Acts would probably not be sufficient notice of the fact that the vendor has no title to the minerals. But an agreement by the vendor of copyholds to procure an enfranchisement under the Copyhold Acts, and convey the freehold to the purchaser, would be notice to the purchaser that he will have no title to the minerals: *Kerr v. Pawson*, 25 Beav. 394.

Where the vendor has been guilty of misrepresentation, the effect of notice is excluded, as the purchaser is justified in relying on the vendor's own statement. Compare the rule that active misrepresentation entitles the purchaser to relief in the case of a patent defect: p. 43. As to what constitutes misrepresenta-

Misrepresentation
versus
notice.

tion, see p. 18; and as to the vendor's silence under certain circumstances amounting to a misrepresentation, see p. 21.

"If a man is induced to enter into a contract by a false representation, it is not a sufficient answer to him to say, 'If you had used due diligence, you would have found out that the statement was untrue. You had the means afforded you of discovering its falsity, and did not choose to avail yourself of them.' Nothing can be plainer, I take it, on the authorities in equity, than that the effect of false representation is not got rid of on the ground that the person to whom it was made has been guilty of negligence": per Jessel, M. R., in *Redgrave v. Hurd*, 20 Ch. Div. 1, at p. 13.

"If a man makes a description calculated to mislead, I do not think it is well for him to say, 'If you had been very careful, you would have found out the blunder'": per James, L. J., in *Re Arnold*, 14 Ch. Div. 270, 281.

And whether the misrepresentation be of a fact, or of the contents or effect of a written document, the purchaser is entitled to rely on it and look no further: *Stanley v. McGauran*, 11 L. R. Ir. 314, at p. 331.

Examples.

In *Re Arnold* (14 Ch. Div. 270), the particulars described the property as "a compact small farm, containing 41a. 3r. 35p., divided as follows"; and in the enumeration of the closes, one close was described as "490a., Bottlesey Green, containing 7a. 1r. 27p.," but the measurement given in the column showing the "contents" gave the size of that close as 4a. 0r. 38p., and this smaller amount tallied with the total amount of 41a. 3r. 35p. A plan was annexed to the particulars including the whole of 490a. The vendor was entitled only to four undivided sevenths of 490a. He contended that the purchaser could see from the conflicting measurements in the particulars that a mistake had been made, and that the plan must have shown the purchaser that 490a. contained more than 4a. 0r. 38p., because an adjacent close of 1a. 0r. 28p. afforded an easy comparison. The purchaser was held entitled to rescind.

Where the right to receive a yearly sum by way of rent for the user of a piece of land as a pleasure ground, was put up for sale as a "freehold ground-rent," and reference was made in the

particulars to the lease reserving the rent, it was held that the purchaser was not bound to look at the lease in order to discover that the thing sold was not a ground-rent : *Evans v. Robins*, 31 L. J. Ex. 465.

But where a leasehold ground-rent, described as "amply secured on certain houses," was in reality secured by an underlease for a term longer than that created by the lease, but the particulars went on to show how the ground-rent was secured, and the conditions mentioned the fact of the length of the term, and referred the purchaser to the lease and underlease, the Court held that the purchaser could not complain : *Smith v. Watts*, 28 L. J. Ch. 220.

On the sale of a lease it often happens that the vendor refers to the lease as containing "the usual covenants." If the covenants are unusual, the misrepresentation entitles the purchaser to relief, notwithstanding that he has notice of the lease, and could have seen that the covenants were unusual. "Usual covenants."

The question, "What is a usual covenant?" is a matter of evidence. Usual covenants may change from one generation to another; they may vary in different parts of the country. In *Hampshire v. Wickens* (7 Ch. D. 555), Jessel, M. R., refers to Davidson's *Precedents*, 3rd ed., vol. v., p. 53, as showing what were usual covenants at that time.

A distinction must be drawn between a contract to sell a lease containing "the usual covenants," and a contract to grant a lease. A wider construction is put upon the word "usual" in the first case than in the second. Thus, a covenant not to assign without leave is not one which the grantor would be entitled to insert if the agreement were to grant a lease to contain the usual covenants : *Buckland v. Papillon*, 1 Eq. 477; and *Hampshire v. Wickens*, 7 Ch. D. 555. But such a covenant is so common and ordinary a covenant, at all events in or near London, as to justify a vendor in describing the lease offered for sale as a lease containing the usual covenants : per Kindersley, V.-C., in *Strangers v. Bishop*, 29 L. T. 120.

The following illustrations are taken from cases in which the dispute was between a vendor and a purchaser, or between a sub-lessor and sub-lessee, as to the covenants in the head-lease. Examples of "usual covenants."

A stipulation that underleases and assignments shall be left with the lessor's solicitor for registration, and a fee of one guinea paid, is unusual: *Brookes v. Drysdale*, 3 C. P. D. 52.

A covenant not to mow meadow land more than once a year is, in the case of a farm lease, not an unusual covenant, although it is more usual to qualify the covenant by excepting from its operation cases where an equivalent in the shape of manure is brought on the land: *Hyde v. Warden*, 3 Ex. Div. 72, at p. 82.

A power of re-entry if the lessee should become bankrupt or make a composition with his creditors, or if execution should issue against him, is unusual, especially if the word lessee is expressed to include assigns: *Ibid.*

A power of re-entry if any business but that of a licensed victualler should be carried on in the house is a usual covenant in a lease of a public-house: *Bennett v. Womack*, 7 B. & C. 627.

On a contract to sell a lease, granted seventeen years previously, one of the covenants of which was that the lessee would build houses of a specified yearly tenantable value (which houses had not been built), the vendor's solicitors represented that the lease contained no covenants unusually restrictive. It was held that this was a misrepresentation, as the covenant was unusual, since it did not specify any limit of time within which the building was to be required, and the purchaser might be called upon at any time by the lessor to allow the houses to be built: *Andrew v. Aitkin*, 22 Ch. D. 218.

A covenant by the lessee to pay land-tax, sewers rate, and all taxes, is fairly described as a usual covenant in particulars of sale of a lease at a "net annual rent": *Bennett v. Womack*, 7 B. & C. 627.

A covenant to do substantial repairs is a usual covenant: *Kendall v. Hill*, 6 Jur. N. S. 968.

"Usual" as
between lessor
and lessee.

The following cases, illustrating what are usual covenants and what unusual, are added, with this caution, that, being cases of agreements to grant leases, the construction of the word "usual" is stricter than the construction adopted in the case of an agreement to sell an existing lease.

A power of re-entry on the bankruptcy of the lessee is not a usual clause in a mining lease: *Hodgkinson v. Croce*, 19 Eq. 591.

A power of re-entry on the lessee's bankruptcy was considered usual in *Haines v. Burnett*, 27 Beav. 500, which was a case of a hotel lease. But this case was disapproved by Jessel, M. R., in *Hampshire v. Wickens*, 7 Ch. D. 555.

A power of re-entry in case of "breach of any of the covenants and agreements by the lessee herein contained" is not a usual clause in a mining lease; and, *semble*, not in any lease: *Hodgkinson v. Crowe*, 10 Ch. 622.

CHAPTER VIII.

MISTAKE.

MISTAKE may be discussed under two heads :

- (1.) Mistake relating to the subject-matter of the contract ;
- (2.) Mistake relating to the contract itself, or to the person of the other party.

It is only the first of these that comes within the scope of this book.

Mistake is treated of in this chapter under the three headings: (i.) of a purchaser seeking relief for his mistake ; (ii.) of a vendor seeking relief for his mistake ; and (iii.) of "common mistake." The third heading is not in *pari materia* with the other two, but it is convenient to discuss the law of common mistake separately, although logically it comes under both of the other headings. It will be seen that a mistake common to both parties is not necessarily a "common mistake," and that the essence of a "common mistake" is not that it is shared by both parties, but that it is a mistake going to the root of the matter, or a mistake involving great hardship.

Purchaser's
mistake.

- (i.) *Purchaser seeking relief on ground of mistake.*

As a general rule, the purchaser will not be relieved on the ground of a mistake made by himself, and not caused by the vendor.

The exceptions to this rule are cases of "common mistake" (on which see p. 78), and probably any cases of great hardship. Also, where the vendor is suing for specific performance, it must be remembered that specific performance is granted or withheld according to the "discretion" of the Court, and "it would be dangerous to attempt an exhaustive definition of the cases in which the Court will refuse specific performance": per Brett, L. J., in *Tamplin v. James*, 15 Ch. Div. at p. 221.

Lord Erskine, in *Stapylton v. Scott*, 13 Ves. 425, after saying that a common mistake avoids the contract, adds: "Where the purchaser's inducement to the contract depends upon a mistake of his own, to which he was not led by the vendor, the consideration whether that avoids the contract is very different; though the Court has a discretion not to give specific performance, but to leave the party to law."

"If a person bidding had private information which misled him, he might be entitled to bring forward his mistake as a defence to specific performance, but he could not bring forward such a mistake as a ground of attack, if he were maintaining specific performance": per Romilly, M. R., in *Fairhead v. Southee*, 11 W. R. 739.

It might, perhaps, be laid down that (apart from the cases of common mistake or great hardship) the Court will compel the purchaser to complete, unless there was some reasonable excuse for his mistake: see *Tamplin v. James*, 15 Ch. Div. at pp. 221, 222. But even this qualification would seem to be doubtful. Where a house, not in Regency Square, but called "No. 39, Regency Square, Brighton," was put up for sale under that appellation, the purchaser, who bought in the expectation of having a house in the Square, was held to his bargain: *White v. Bradshaw*, 16 Jur. 738. The mistake was a very natural one, and one admitting of "reasonable excuse." Perhaps the *dicta* as to the discretion of the Court in decreeing specific performance may all be referable to hardship, and the rule may be laid down that, except in cases of unusual hardship, the purchaser will be compelled to complete in spite of his mistake. The amount of hardship must be left undefined. There would certainly seem to be great hardship in the Regency Square case.

Where the purchaser made a mistake through relying on statements contained in the "first edition" of the particulars of sale, which contained no conditions of sale, and would have discovered his mistake if he had read the second edition, of which three times as many copies had been printed, the vendor distributing them widely and calling the attention of purchasers to them, no relief was given to the purchaser: *Goddard v. Jeffreys*, 51 L. J. Ch. 57. But, where the purchaser mistook

Examples of
purchaser's
mistake.

which lot was being sold, and bid for a lot he did not want, the vendor's bill for specific performance was dismissed without costs: *Malins v. Freeman*, 2 Keen, 25.

Specific performance was decreed of a contract to purchase leasehold houses, although the purchaser had mistaken the effect of the covenants, and found out afterwards that the lease prohibited him from applying the property to the purpose for which he had bought it: *Morley v. Clavering*, 29 Beav. 84.

On a sale of freeholds and adjoining leaseholds in two lots, the first lot being described as freehold in occupation of R., and the second as leasehold, the purchaser of lot 2, who knew that part of the premises occupied by R. and included in lot 1 was leasehold, and bought in the expectation that that leasehold part would be included in his lot, was held not entitled to have the leasehold part of lot 1 conveyed to him or to receive compensation, as his mistake was not caused by the vendor: *Fairhead v. Southee*, 11 W. R. 739.

Where the purchaser, who was personally acquainted with the property, mistook the extent of the property offered for sale, trusting to his own knowledge, and not looking at the particulars, which would have undeceived him, he was compelled to complete notwithstanding his mistake: *Tamplin v. James*, 15 Ch. Div. 215.

Where the purchaser bought land 176 feet deep in order to build a carriage factory, and discovered afterwards that owing to the Metropolis Management Act he would be unable to build higher than 12 feet for a space of 62 feet from the street; the vendor's bill for specific performance was dismissed, but without costs: *Bray v. Briggs*, 20 W. R. 962. Lord Romilly decided the case simply on the ground of mistake; but it may be noticed that the vendor had himself contributed to the mistake by advertising the property as fit for "a carriage factory or any building requiring space," and by telling the purchaser he could build within 5 feet of the road.

Vendor's
silence.

The mere fact that the purchaser has made a mistake as to the property, or the nature of the property, and that the vendor knows of this mistake, does not put upon the vendor the duty of correcting the mistake: see *Morley v. Clavering*, 29 Beav. 84.

When it is said, as in Dart, p. 104, that there may be a "silence which is as eloquent as words," this means a silence upon which the purchaser relies; for instance, the silence of the vendor when the purchaser makes a statement in the vendor's presence expecting the vendor to contradict him if he is mistaken. The passive acquiescence of the vendor in the purchaser's self-deception would not, of itself, entitle the purchaser to avoid the contract: see *Smith v. Hughes*, L. R. 6 Q. B. 597, a case of a sale of chattels without warranty. If, however, the vendor not only knows what the purchaser has in his mind, but knows that the purchaser is aware that he knows it, then the mistake of the purchaser is caused by the vendor's conduct, and the purchaser will be relieved even though the vendor has made no active misrepresentation: see per Hannen, J., in *Smith v. Hughes*, L. R. 6 Q. B. at p. 611.

If the vendor makes a misrepresentation to a third person, and that third person to the vendor's knowledge communicates the misrepresentation to the purchaser, the vendor is treated as having himself made the misrepresentation: *Pilmore v. Hood*, 5 Bing. N. C. 97.

(ii.) *Vendor seeking relief on ground of mistake.*

Vendor's
mistake.

As a general rule, mistake, other than "common mistake," is no ground for relieving the vendor from the contract. A vendor is bound by the description of the property which he gives in the particulars of sale.

"Any person, however unversant in the actual situation of his estate that will give a description, must be bound by that, whether cognizant of it or not": per Lord Thurlow in *Calverley v. Williams*, 1 Ves. jun. 210, at p. 213. The vendor is said to know the real facts, because he undertakes to know by undertaking to give a description: *Ibid.* p. 212.

In *Baxendale v. Seale*, 19 Beav. 601, and *Earl of Durham v. Legard*, 34 Beav. 611, the general rule that a vendor is responsible for the description he has given was not followed. In the former case the vendor was relieved from a contract to sell a manor with "all the lord's rights," when he discovered that certain valuable rights belonged to the manor which he had no intention of selling, and which he never thought belonged to

Vendor
relieved in
two cases.

the manor. In the latter, the vendor described his property as containing 21,750 acres, when it contained only half that quantity. Lord Romilly refused to grant the purchaser partial performance with an abatement of the purchase-money, holding that this was a case of mistake. The true reason for the decision in both cases probably was that they were cases of hardship ; in other words, it was the extent of the vendor's mistake which caused the Court to depart from the rule, and these cases should probably be classed with other cases of "common mistake."

"Common mistake."

(iii.) *Common mistake.*

If there has been what is called a common mistake, the Court will relieve either party from the contract, even though the contract has been completed by an actual conveyance of the property.

Attempted definition of term.

The phrase "common mistake" is an instance of what has been termed legal shorthand ; it expresses something more than the literal meaning of the words themselves. Taken literally, the words merely mean a mistake in which both parties share, and the phrase is used in antithesis to a unilateral mistake. But when it is said that the Courts will relieve in case of common mistake, it is not meant that where both parties have made the same mistake, the Courts will relieve either of them from the contract. Every misdescription innocently made by the vendor, and believed in by the purchaser, is a mistake common to both parties, but it is not necessarily a "common mistake" in the language of lawyers. The condensed phrase "common mistake" might be enlarged thus : "mistake common to both parties, and of such a nature that to enforce the contract would inflict very great hardship on one of the parties." It is true that where relief is given for a common mistake, the Courts do not expressly advert to the question of hardship. As a rule it is the subject-matter of the mistake which is considered. Thus, it is sometimes said that the mistake is "as to the subject-matter of the contract," and that "the parties were not *ad idem*," or (as in *McKensie v. Hesketh*, 7 Ch. D. at p. 682, per Fry, J.) that the mistake "goes to the *corpus* with which the contract deals," or is "a mistake as to the essential terms of the contract."

In the absence of further definition, these phrases do not help us much to an explanation of what is meant by a common

mistake. Is, for instance, a mistake as to acreage one which goes to the *corpus* or not? If the vendor having 100 acres of land by a slip describes it as 200, is this a mistake as to the essential terms of the contract or not? In *McKenzie v. Hesketh*, 7 Ch. D. 675, at p. 682, Fry, J., said that a mere difference in quantity had never been held to be a bar to specific performance (meaning specific performance at the instance of the purchaser or intending lessee). But in the *Earl of Durham v. Legard*, 34 Beav. 611, the vendor, who had by mistake described his property as containing double the quantity which it really contained, was relieved from the consequences of his mistake, and the Court refused to grant the purchaser specific performance with abatement. If the phrase "mistake as to the *corpus*" means anything, it would seem to mean a "mistake as to the whole of the subject-matter"; so that no relief would be given on the ground of a mistake affecting part only of the subject-matter, however large that part might be. The cases of *Durham v. Legard* and *Barendale v. Scale* (see p. 77) do not support this view; so the phrase "mistake as to the *corpus*" should be discarded as misleading.

Further, there may be a mistake common to both parties and affecting the whole of the subject-matter, and yet not one for which the Court would relieve (as on a "common mistake") after conveyance. "If A. sells an estate, believing himself to have a good title when he has not, and B. pays for it, believing the same thing, that is a mutual mistake; but it is a mutual mistake for which the purchaser will have to suffer, because when he once takes a conveyance and pays his purchase-money, there is an end to the matter": per Malins, V.-C., in *Allen v. Richardson*, 13 Ch. D. at p. 543.

The cases of "common mistake" have usually been cases in which the property, or the right of the vendor, had been destroyed before the sale, or in which the thing sold belonged all the time to the purchaser, or in which the interest of the vendor had been completely changed before the sale.

A purchaser buying what afterwards turns out to have been his property all the time, is relieved from his bargain, even after the execution of the conveyance: *Bingham v. Bingham*, 1 Ves. sen. 126; *Jones v. Clifford*, 3 Ch. D. 779.

Examples of
"common
mistake."

Similarly, a person contracting to take a lease of what he afterwards discovers was his own property at the time of the contract: *Cooper v. Phibbs*, L. R. 2 H. L. 149.

A purchaser of a remainder in fee expectant on an estate tail was relieved, even after conveyance, as the remainder had already been destroyed by the tenant in tail executing a disentailing assurance: *Hitchcock v. Giddings*, 4 Pri. 135.

And the fact that the purchaser might have discovered his rights from the abstract makes no difference: *Bingham v. Bingham*, 1 Ves. sen. 126.

A vendor of a reversionary interest, which, though he was not aware of the fact, had at the time of the contract fallen into possession by the death of the tenant for life, was relieved from his bargain: *Colyer v. Clay*, 7 Beav. 188.

A purchaser of a life annuity is entitled to recover his purchase-money, if at the time of the contract the annuitant was dead: *Strickland v. Turner*, 7 Exch. 208.

Similarly, the purchaser of an estate which at the time of the contract had been swept away by a flood: *semble, Hitchcock v. Giddings*, 4 Pri. 135, at p. 141.

Mistake of
law.

The mistake upon which the relief is founded must be a mistake as to a matter of fact, not a mistake of law.

A mistake as to private rights may be a mistake of fact, not of law. Thus, a person entitled to a fishery, thinking it belonged to three other persons, agreed to rent it from them, but on discovering his mistake was held entitled to be relieved from the agreement: *Cooper v. Phibbs*, L. R. 2 H. L. 149. Lord Westbury said, *ibid.* p. 170: "It is said *ignorantia juris haud excusat*; but in that maxim *jus* is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake."

The application of the maxim, *ignorantia juris neminem excusat*

to cases of "common mistake" would, but for the discussions of that maxim in *Cooper v. Phibbs*, L. R. 2 H. L. 149, and *Beauchamp v. Winn*, L. R. 6 H. L. 223, 234, appear to be excluded by the fact that a "common mistake" is necessarily a mistake of fact. It is a mistake as to a private right, which, though it may be dependent on an erroneous conclusion of law, is none the less a mistake of fact. A misrepresentation is different; it is possible for the vendor to misrepresent the law without misrepresenting the facts, or to separate his statement of law from his application of that law to the facts.

The mere fact that the vendor's description is vague will not prevent the Court from relieving him, if he had a definite notion of the extent of the subject-matter of the sale. Vagueness
of vendor's
description.

Thus, where the vendor of a manor, "including all the lord's rights," discovered after the contract that several valuable rights over lands not in the parish in which the manor was situate belonged to the manor, the Court relieved him on the ground of mistake: *Baxendale v. Seale*, 19 Beav. 601.

If in that case both vendor and purchaser had intended the sale to be of a mere doubtful right, the extent and value of which was understood to be unknown to both, then the fact that the sale afterwards became disadvantageous to the vendor would not have affected the contract. But both parties intended the sale to be of something definite, though they did not necessarily form the same conception of the extent of the property which would be comprised.

CHAPTER IX.

FRAUD.

It is impossible to give a definition of fraud which will fit all cases. In fact, the meaning of the words "fraud" and "fraudulent" has not only varied in the various Courts and at different times, but perhaps still varies to a certain extent according to the kind of action in which relief for the alleged fraud is sought. It will be necessary, therefore, to discuss the question, "What is fraud?" under the separate headings of an action for rescission before completion, an action for rescission after completion, an action of deceit, and an action for misrepresentation.

Action for
rescission.

(i.) *Action for rescission before completion.*

It was formerly considered that, though misrepresentation without fraud was sufficient as a defence to an action for specific performance, fraud was necessary to entitle the purchaser to rescission. Thus, in Sug. p. 244, under the head of rescission, we find the statement, "Unless a clear fraud be established there ought to be no relief in equity; for there is a great difference between establishing and rescinding an agreement." James, L.J., in *Torrance v. Bolton*, 8 Ch. App. 118 (which was an action for rescission), explains away the word "fraud" in this passage (missing the point of the second part of the sentence): he says (*Ibid.* p. 124), "The word 'fraud' there is *nomen generalissimum*, and it must not be construed so as to mislead persons into the notion that contracts for the sale and purchase of lands are in any respect privileged, so as to be free from the ordinary jurisdiction of the Court to deal with them as it deals with any other instrument or any other transactions in which the Court is of opinion that it is unconscientious for a person to avail himself of the legal advantage which he has obtained."

It may now be considered settled that an innocent misdescription by the vendor will entitle the purchaser not only to resist an action by the vendor for specific performance, but to succeed in an action for rescinding the contract (subject to the rules laid down in Chapter XII., as to completing with compensation).

If there has been a *fraudulent* misrepresentation the purchaser will be entitled to rescind, although the misrepresentation was in a "non-essential" matter (see p. 102), and the vendor offers to complete, with compensation for the misrepresentation. Even where there is a condition for compensation, that is treated as only "meant to guard against unintentional errors": *Duke of Norfolk v. Worthy*, 1 Cam. 337.

A misstatement of rent is generally treated as non-essential (see p. 115), and the vendor is allowed to complete, giving compensation for the misdescription; but in *Dimmock v. Hallett*, 2 Ch. 21 (where the vendor's position was, if anything, strengthened by a condition for compensation), a misstatement of the occupation rent was held to entitle the purchaser to rescind, although the vendor offered compensation. Cairns, L. J., said that "the statement as to the rent was calculated to mislead, and was not prepared with the good faith which is requisite in conditions of sale." Turner, L. J., however, refrained from imputing "actual fraud." See p. 29 of the report.

So, too, it would seem that a vendor who has fraudulently misstated the acreage cannot rely on the expression "more or less" to cover a deficiency in quantity, although the deficiency is such as, if the error had been innocently made, would have been covered by the words "more or less": *Winch v. Winchester*, 1 Ves. & B. 375, at p. 377.

In *Reese River Co. v. Smith*, L. R. 4 H. L. 64, at p. 79 (which was in effect an action by a shareholder for rescission), Lord Cairns said a fraud had been committed, and added: "When I say a 'fraud' I do not enter into any question with regard to the imputation of what may be called fraud in the more invidious sense against the directors. I think it may be quite possible, as has been alleged, that they were ignorant of the untruth of the statements made in their prospectus. But I apprehend it to be the rule of law that if persons take upon

themselves to make assertions as to which they are ignorant, whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue."

Rescission
after comple-
tion.

(ii.) *Action for rescission after completion.*

In the absence of fraud, the Courts will not, as a rule, rescind a contract for sale which has been completed by the execution of the conveyance, and payment of the purchase-money.

Definition of
fraud.

Fraud in such a case must be actual moral fraud, consisting either of a positive misrepresentation intentionally or recklessly made, or of some other intentional act, *e. g.*, the suppression of a defect in the title from the abstract. In some, however, of the cases in which the contract has been rescinded after the conveyance, there seems to have been no actual fraud.

"Where the conveyance has been executed, I apprehend that a Court of Equity will set aside the conveyance only on the ground of actual fraud": per Lord Campbell, in *Wilde v. Gibson*, 1 H. L. C. 615.

Examples of
non-fraudu-
lent state-
ments.

In *Legge v. Croker*, 1 Ball & B. 506, the lessor had, in perfect good faith, assured the lessee that there was no right of way over the ground; that there had been formerly, but that it had been legally stopped by a presentment of the grand jury. It turned out that there was a footway, the presentment applying only to a carriage way, and the lessee was convicted for obstructing it. Lord Manners, in dismissing the lessee's bill to be relieved from the lease, said: "If there were a wilful misrepresentation the plaintiff might be entitled to relief, but the lessor conceived himself entitled in point of law in asserting that there existed no right of way; it cannot be called a misrepresentation."

In *Brownlie v. Campbell*, 5 App. Ca. 925, a representation which was false in fact, but which the vendor believed to be true, was held insufficient to entitle the purchaser to relief after conveyance, the purchaser having bought subject to "all risks of error in the particulars."

There must be "a case of fraud, or a case of misrepresentation amounting to fraud": per Lord Selborne, *ibid.* p. 937.

Vendor's
non-disclosure
of claims.

As to non-disclosure by the vendor or his solicitor, Lord Hatherley said (*ibid.* p. 944): "If it is with a fraudulent intent

that the disclosure is not made, and the facts are kept back for the purpose of deceiving those with whom he is treating, that is one thing. That might be dealt with as fraud. But to say that a person, who is aware that claims have been made, should tax his memory without any question being put to him upon the subject, and that he should be bound to remember all the claims which have been made, and all the grounds upon which they have been made, would be a doctrine which would be extremely alarming to all those who have to deal with estates. . . . It is quite a different thing when a question is asked with reference to a particular fact, and an answer is given 'yes' or 'no' as to that fact *simpliciter*. The person who gives that reply must be answerable for the effects of his representation. Whether or not he *bond fide* was aware, and had treasured up in his memory, the existence of certain facts connected with the property, he would be answerable if he took it upon himself to say that such and such a thing had not occurred or had occurred."

"A misrepresentation innocently made becomes fraudulent if the vendor afterwards discovers his mistake, and does not correct it": per Lord Blackburn in *Brownlie v. Campbell*, 5 App. Ca. at p. 950. And in such a case a contract would be rescinded, even after completion: *Clapham v. Shillito*, 7 Beav. 146, at p. 149.

Misrepresentation fraudulent *ex post facto*.

In some cases there may be fraud without any positive statement being made.

Fraud without misrepresentation.

Thus, where a person, knowing that he has no title at all to the property, or to an essential or material part of it, and, knowing that the person with whom he is contracting is perfectly ignorant of the title, contracts to grant a lease, the lessee may rescind after completion, even though there has been no affirmative statement made as to the title. See *Mostyn v. West Mostyn, &c. Co.*, 1 C. P. D. 145, where the lessor granted a lease of mines, a material portion of which, as the lessor knew, were situate below the low-water mark, and therefore belonged to the Crown.

In cases of sales of land, it can rarely happen that the purchaser, after examining the abstract, knows less about the title than the vendor himself, unless the vendor has fraudulently

suppressed a deed, or commenced the title later, in order to avoid showing the defect.

"Whether it would be a fraud to offer as good a title which the vendor knows to be defective in point of law, it is not necessary to determine. But if he knows and conceals a fact material to the validity of the title, I am not aware of any principle on which relief can be refused to the purchaser": per Grant, M. R., in *Edwards v. M'Leay*, G. Coop. 308; affirmed 2 Sw. 287.

"Legal fraud."

In one case, the purchaser was relieved, even after conveyance, on the ground of "legal fraud."

In *Hart v. Swaine*, 7 Ch. D. 42, the vendor, selling freehold and copyhold property, described it as freehold. He had previously bought it with some other property, the whole being then described as "about three-fourths freehold and one-fourth copyhold," but there was nothing in the abstract to show that any part was copyhold. He afterwards sold part of the property to S., and entertained a vague notion either that no part of what he had bought was copyhold, or that what he sold to S. was the copyhold part. The Court held the representation to be fraudulent, and rescinded the contract, although the conveyance had been executed, on the ground that the vendor had committed "legal fraud." But *Hart v. Swaine* "was a case in which a representation that land was freehold, which in point of fact was copyhold, was made under circumstances bringing home knowledge, as strongly as anything in the world could do, to the person who made it": *Brownlie v. Campbell*, 5 App. Ca. at p. 938.

The term "legal fraud" has been ridiculed by Lord Bramwell in *Weir v. Bell*, 3 Ex. Div. at p. 243. But Sir James Hannen (in *Peek v. Derry*, 37 Ch. Div. 541, at p. 582) approves of the phrase, explaining it as "that degree of moral culpability in the statement of an untruth to induce another to alter his position to which the law attaches responsibility."

Action of deceit.

(iii.) *Action of deceit.*

As between vendor and purchaser, an action of deceit is necessary if the purchaser wishes to recover damages for the loss of his bargain on the ground of the vendor's fraudulent mis-

description. If the misdescription has been innocently made, the purchaser can only recover, by way of damages, the expenses he has properly incurred in relation to the sale; he cannot get damages for the loss of his bargain. See Chap. XVI. p. 122.

An action of deceit is also necessary to enable the purchaser to recover compensation for misdescription after completion where there is no condition of sale enabling him to do so: *Joliffe v. Baker*, 11 Q. B. D. 255.

The action of deceit is, in its origin, a common law action. To support the action it is necessary to allege and prove fraud: *Haycraft v. Creasey*, 2 East, 92. "An action of deceit is a common law action, and must be decided on the same principles, whether it be brought in the Chancery Division or any of the Common Law Divisions, there being, in my opinion, no such thing as an equitable action for deceit. It is a common law action in which it is necessary to prove that a statement has been made which, to the knowledge of the person making it, was false, or which was made by him with such recklessness as to make him liable just as if he knew it to be false. . . . Mere omission, even though such as would give reason for setting aside a contract, is not, in my opinion, if it does not make the substantive statements false, a sufficient ground for maintaining an action of deceit": per Cotton, L. J., in *Arkwright v. Newbold*, 17 Ch. Div. 301, at p. 320.

In *Peek v. Derry*, 37 Ch. Div. 541, Sir J. Hannen quotes the remarks of Lord Cairns in *Reese River Co. v. Smith*, L. R. 4 H. L. at p. 79 (see above, p. 83), and says that their application extends to actions for deceit as well as to actions for the rescission of contracts.

The judgments in *Peek v. Derry* and *Smith v. Chadwick*, 20 Ch. Div. 27, seem to suggest the following definition of the fraud requisite to support an action of deceit:—A false statement made by a person knowing it to be false, or not caring whether it be true or false, or believing it to be true without having reasonable ground for such belief. If this definition is correct, it would seem that no greater amount of fraud is requisite to support an action of deceit than is requisite to support an action for misrepresentation: see below, p. 88.

Definition of fraud.

"In an action of deceit, even though the statement may be untrue, yet if it was made in good faith, and the defendant had reasonable ground for believing it to be true, the defendant will succeed": per Jessel, M. R., in *Smith v. Chadwick*, 20 Ch. Div. 27, at p. 45.

The plaintiff in an action of deceit must establish "actual fraud, which is to be judged of by the nature and character of the representations made, considered with reference to the object for which they were made, the knowledge or means of knowledge of the person making them, and the intention which the law justly imputes to every man to produce those consequences which are the natural result of his acts": per Lord Selborne, in *Smith v. Chadwick*, 9 App. Ca. 187, at p. 190.

In *Joliffe v. Baker*, 11 Q. B. D. 255, at p. 275, it was said that "moral turpitude" is necessary.

In *Eaglesfield v. Marquis of Londonderry*, 4 Ch. Div. 693, at p. 711, it was said there must be "a wilful and fraudulent statement of that which is false."

(iv.) *Action for misrepresentation.*

Action for
misrepresentation.

Actions to recover damages for misrepresentations are of three sorts:—

(1.) Where the defendant is under no special duty towards the plaintiff, and the cause of action is the damage caused by the fraudulent misrepresentation of the defendant. This action is analogous to, and governed by, the same principles as the common law action of deceit, and is more properly called an action of deceit than an action for misrepresentation.

(2.) Where a fiduciary relation exists between the parties; and

(3.) Where a person who, from his position, knows, or ought to know, a certain fact, makes a false statement about that fact to another person who is about to deal for valuable consideration with a particular subject, and whose dealing, as the person making the statement knows, depends on the statement so made to him. See the cases of *Burrowes v. Lock*, 10 Ves. 470, and *Slim v. Croucher*, 1 D. F. & J. 518.

In actions of the second and third sort an innocent misrepresentation is sufficient to give the plaintiff a right to damages.

It is not always easy to tell under which class an action comes. Thus, an action to recover damages against the directors of a company for misrepresentations in the prospectus was, in *Peek v. Gurney*, L. R. 6 H. L. at p. 390, classified by Lord Chelmsford under the first head as an action of deceit. But in the same action Lord Cairns said (on p. 409) that it did not matter how innocent the directors' motive was. So, in *Eaglesfield v. Marquis of Londonderry*, 4 Ch. Div. 693, also an action for misrepresentation by directors, James, L. J., treated the action as one of deceit (see p. 711); but Jessel, M. R. (at pp. 704, 705), treated it as different from an action of deceit, and as analogous to such actions for misrepresentation as *Burrowes v. Loch*. In *Peek v. Derry*, 37 Ch. Div. 541, an action against directors for misrepresentation was treated as an action of deceit, but the definition of fraud was so widened as to render unimportant the distinction between an action of deceit and an action for misrepresentation.

"There is no fiduciary relation between the ordinary vendor and purchaser": per Lord Campbell in *Walters v. Morgan*, 3 D. F. & J. 718, at p. 723. In order that a purchaser should recover damages for the loss of his bargain he must prove the same fraud as in an action of deceit: see above, p. 86.

In an action for misrepresentation (other than an action of deceit) it is not necessary to prove fraud; but, on the other hand, it is necessary to prove a positive misstatement, or a statement so partial and defective as to be misleading: *Peek v. Gurney*, L. R. 6 H. L. at p. 403.

CHAPTER X.

MISREPRESENTATION BY THE VENDOR'S AGENT.

Innocent mis-
representation
by agent.

(i.) *Innocent Misrepresentations.*

An innocent misrepresentation made by the auctioneer, or other person employed by the vendor as his agent to sell the property, will, if made in the ordinary course of business as auctioneer or agent for sale, have the same effect on the rights of the vendor and purchaser as an innocent misrepresentation made by the vendor himself.

"A man employs an agent to let a house for him; that authority, in my opinion, contains also an authority to describe the property truly, to represent its actual situation, and if he thinks fit to represent its value. That is within the scope of the agent's authority; and when the authority is changed, and instead of being an authority to let it becomes an authority to find a purchaser, I think the authority is just the same. I think the principal does thereby authorize his agent to describe, and binds him to describe truly, the property which is to be the subject disposed of; he authorizes the agent to state any fact or circumstance which may relate to the value of the property": per Bacon, V.-C., in *Mullens v. Miller*, 52 L. J. Ch. 380.

If the vendor mentions a defect in the property, and the vendor's solicitor says, "I have looked through the title deeds and you are wrong," the purchaser, if he relies on the solicitor's statement rather than on that of the vendor, is entitled to relief: see *Nottingham, &c. v. Butler*, 16 Q. B. Div. 778.

(ii.) *Fraud Committed by Agent.*

Fraudulent
misrepresenta-
tion.

As the relief given in cases of fraud is more extensive than that given in cases of innocent misrepresentation (see p. 86), it

is necessary to inquire under what circumstances a misrepresentation by the vendor's agent renders the vendor liable as for fraud.

If the vendor authorizes the agent to make a representation which the vendor knows to be untrue, the vendor is guilty of fraud. False to
vendor's
knowledge.

If the vendor knowingly and purposely refers the purchaser to an ignorant agent for information, the vendor is liable as for fraud if the agent makes any misrepresentation: *Wilson v. Fuller*, 3 Q. B. 68; *Ludgater v. Love*, 44 L. T. N. S. 694. Ignorant
agent.

If the vendor knows that the agent has made a false representation, and does not correct it, the vendor will probably be liable for fraud: see *Pilmore v. Hood*, 5 Bing. N. C. 97. Vendor's
connivance.

In the above cases there has been knowledge or intention on the vendor's part. There is more difficulty with regard to the cases in which the fraud of the agent himself renders the vendor liable as for fraud, the vendor not intending to commit fraud, and not knowing that his agent has committed fraud. The rule seems to be this:— Fraud of
agent himself.

If a fraud, tending to the benefit of the principal, has been committed by the agent in the course of business, and acting within the limits of the authority ordinarily given to an agent in such business, the principal is liable as for fraud.

The case of *Cornfoot v. Fowke*, 6 M. & W. 358, appears at first sight to conflict with this proposition. There the defendant, before taking a ready-furnished house, asked "if there was anything objectionable about the house," and the landlord's agent replied, "nothing whatever." There was, as the landlord, though not his agent, knew, a brothel next door; yet no relief was given, on the ground that the representation was not fraudulent, because it was not false to the knowledge of the agent who made it. Lord Abinger dissented from the decision on the ground that it was fraudulent for the agent to assert that which he did not know. In *National Exchange Co. v. Drew*, 2 Macq. 108, at p. 144, Lord St. Leonards defends the case on the ground that the allegation was of fraud and covin, mistake or misrepresentation not being pleaded. He says (p. 145): "Supposing there had been in that case no allegation

of fraud, but it had been put simply upon the ground of misrepresentation; it was not denied, in the course of the judgment, as I understand it, that if a principal, with knowledge of a fact which was material to the value of the property, employed an agent, whom he knew to be ignorant of the fact, for the purpose of concealing it, he could not avail himself of that concealment, and he would be responsible. I should feel no hesitation, if I had to decide that case, in saying that, although the representation was not fraudulent, the agent not knowing that it was false, yet that as it in fact was false, and false to the knowledge of the principal, although the agent did not know it, it ought to vitiate the contract": cf., too, *Bartlett v. Salmon*, 6 De G. M. & G. 33. In *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259, Willes, J., says (p. 262): "I should be sorry to have it supposed that *Cornfoot v. Fouke* turned upon anything but a point of pleading." The same explanation must be given of the decision in *Wilde v. Gibson*, 1 Cl. & F. 605. The true rule is laid down by Willes, J., in *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259, at p. 255: "The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service, and for the master's benefit, though no express command or privity of the master be proved." And, after giving instances of the application of this principle, he adds: "In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in." The correctness of this statement of the law was recognized in *Swift v. Winterbotham*, L. R. 8 Q. B. 244 (on app., 9 Q. B. 301); and *Mackay v. Commercial Bank of New Brunswick*, 5 P. C. 394. See, too, *Swire v. Francis*, 3 App. Ca. 106. Bramwell, L. J., in *Weir v. Bell*, 3 Ex. Div. 238, at p. 244, whilst approving of the decision in *Barwick v. English Joint Stock Bank* (*ubi supra*), doubts the reasoning on which it is founded; he thinks the true ground is, "that every person who authorizes another to act for him in the making of any contract, undertakes

for the absence of fraud in that person in the execution of the authority given, as much as he undertakes for its absence in himself when he makes the contract."

The principal is not liable as for fraud if the fraud has been committed by the agent for his own private ends, and not for the benefit of the principal: *British Mutual, &c. v. Charnwood Forest, &c.*, 18 Q. B. Div. 714.

If the agent commits the fraud otherwise than in the natural course of business, the vendor is not liable to an action of deceit: see *Mackay v. Bank of New Brunswick*, 5 P. C. 394. But such fraud would probably give a purchaser the right to rescind the contract even after the conveyance.

The agent who has committed a fraud is also himself personally liable to the purchaser: see *Weir v. Bell*, 3 Ex. Div. 238, at p. 248; and *Arnot v. Biscoe*, 1 Ves. sen. 95. And where a person represents that he is agent for the vendor when he is not, he is liable to the purchaser in damages: *Collen v. Wright*, 8 E. & B. 647. Agent liable.

CHAPTER XI.

MAP OR PLAN.

Sale plan.

THE purchaser is affected with notice of facts stated in the sale plan, if it is incorporated in the agreement, or is referred to, and a sufficient opportunity of inspection afforded.

Where the tithe map to which the particulars referred, and a tracing of which was in the sale room, and the admeasurement given in the particulars themselves showed that a yard adjacent to, and used with, the premises was not included in the sale, the purchaser, who, from his knowledge and inspection of the premises, thought he was buying the yard, and had not looked at the map, was compelled to complete: *Tamplin v. James*, 15 Ch. Div. 215.

Where there was an open archway under part of the house, the lease whereof was being sold, and the archway was described "gateway" on the ground plan in the lease, this was held to be notice to the purchaser of the existence of a right of way, even though the adjoining plots had not been built over: *Davies v. Sear*, 7 Eq. 427. The conveyance to the purchaser contained no reservation of a right of way, but the right was held to have been reserved.

Misdescription.

If there is an actual misdescription in the particulars, a reference to a plan will not correct the misdescription unless the purchaser as a fact inspects the plan and discovers the mistake before the sale: *Re Arnold*, 14 Ch. Div. 270.

Plan versus particulars.

A verbal declaration by the auctioneer that the property is sold by the particulars, and not by the plan, will not be sufficient to disentitle the purchaser to rescind on the ground that he was misled by the plan: see *Pope v. Garland*, 4 Y. & C. 394, 404.

Misleading appearance of property.

If the appearance of the property itself is misleading, the fact that the plan is correct is not enough; there should be an express statement, either in the plan or in the particulars, correcting the inference to be drawn from the look of the property.

Thus, where the true boundary fence was hidden by shrubs, and the property appeared to extend to an iron fence beyond the shrubbery, the purchaser was relieved, although the plan was

correct: *Denny v. Hancock*, 6 Ch. 1, where Mellish, L. J., said, "The relative situations of the real and apparent boundaries should not merely be shown on the plan, but express words should be inserted in the particulars describing the real boundary."

Although a footway across the property has been held to be a Footway. patent defect, if the vendor shows a plan of the property without the footway being marked thereon, the purchaser will be relieved, probably on the ground that the misrepresentation made by the plan negatives the notice which the purchaser would otherwise have from the outward appearance of the property. See *Dykes v. Blake*, 4 Bing. N. C. 463, where, however, there was an additional misrepresentation, the vendor having described the land as "building land."

In an early case at law, in which there was a condition for compensation, it was held that a description on a map showing as a turnpike road immediately adjoining the property offered for sale that which was in reality only a footpath, there being no road within a quarter of a mile, was not, in the absence of fraud, such a misdescription as would entitle the purchaser to rescind: *Wright v. Wilson*, 1 Moo. & R. 207. This case would now probably not be followed. Footway marked as road.

The delineation of adjacent portions of the vendor's property does not amount to an undertaking with the purchaser that they shall remain unaltered, *e. g.*, by building. The plan merely shows the relative position of that part which the vendor is about to sell: *Squire v. Campbell*, 1 Myl. & Cr. 459. Other land of vendor delineated.

Upon a sale in lots, a delineation on the sale plan of intended roads does not in itself amount to a representation or undertaking by the vendor that the roads shall be made: *Randall v. Hall*, 4 De G. & Sm. 343. And a purchaser of one lot is not entitled to have all the roads made, but only such road as shall enable him to reach the nearest highway: *Ibid.* Intended roads.

But where the vendor undertook to make good and sufficient roads over the land, and there was no plan showing the intended roads, it was held that the undertaking was not satisfied by the vendor making a road up to the purchaser's lot merely, although no other houses but the purchaser's had been built: *Mason v. Cole*, 4 Ex. 375.

Where land was described as "approached by Cuddington

Avenue, a new road (made up and sewered), which is continued across the property," and there was a plan attached to the particulars delineating Cuddington Avenue, and in dotted lines its continuance over the estate, it was held that this amounted to a representation that the continuation of the road was in the same condition as Cuddington Avenue, which had gravel with a foundation of chalk and two footpaths, one gravelled and the other not: *Re Chiffertel*, 40 Ch. D. 45.

Width of
new roads.

An undertaking to make the roads marked on the plan is not sufficient to bind the vendor to make them of the same width: *Nurse v. Lord Seymour*, 13 Beav. 254, at p. 269. But where there is a general building scheme, and the conditions state that "the land is set out with good roads, and would afford frontages eligible for the erection of genteel residences of a superior description," and the sale plan delineates the intended divisions of the property by new roads, and the conditions state that "the proposed plan by which the lots will be sold secures to each lot wide and handsome roads," it is not competent to the vendor to divide the land in a different manner, "so as to attract an occupancy and population entirely different from that which would have been produced by acting on the plan proposed and held out at the sale": *Peacock v. Penson*, 11 Beav. 355.

Waterway.

The delineation on the sale plan of a water-drain from lot A. to lot B. does not amount to a representation or undertaking by the vendor that the conveyance of lot A. shall reserve a right of waterway in favour of the purchaser of lot B.: *Feuster v. Turner*, 6 Jur. 144.

Public-house.

On a sale in lots of what appeared to be the whole of the vendor's "M. estate," the vendor reserved a small piece of land. On the plan, the lots were coloured, and the names of adjoining owners printed, but the vendor's name was not printed on the piece reserved. The sale was subject to restrictive conditions as to trades, public-houses, &c., affecting the whole of the lots, and it was reasonably certain that no public-house would be erected on any of the adjoining property except on the reserved piece. A purchaser of a lot near the reserved piece was held entitled to refuse to complete, unless the vendor would subject the reserved piece to the same restrictive covenants against public-houses, &c.: *Baskcomb v. Beckwith*, 8 Eq. 100.

CHAPTER XII.

SUMMARY OF THE RELIEF TO WHICH THE PURCHASER IS
ENTITLED IN CASES OF MISDESCRIPTION.

THE purchaser can compel the vendor to make good any errors *Summary.* or representations contained in the written contract if it be possible for the vendor to do so, unless this would lead to a breach of trust, or contravene some express enactment, or be prejudicial to the interests of third persons in the property sold, or would inflict great hardship on the vendor : see below, pp. 99—101. The purchaser cannot compel the vendor to make good errors or representations contained in a parol statement not incorporated in the written contract, unless the vendor himself seeks to enforce the contract.

If the vendor cannot, or if the Court refuses to compel the vendor to make good the error or representation, then, in the absence of any previous agreement between the parties as to compensation, the rights of the vendor and purchaser may be tabulated as follows:—

1. The Court will, at the desire of the purchaser, rescind the contract if there has been an essential misdescription, although the vendor would prefer to complete, giving compensation.

2. The Court will, at the desire of the vendor, decree partial performance with compensation, if the misdescription was non-essential, and was made innocently [and if compensation can be fairly assessed], although the purchaser would prefer to abandon the contract.

3. The Court will, at the desire of the purchaser, decree partial performance with compensation, although the misdescription was one which would usually be regarded as essential, and even though the vendor would prefer to abandon the contract, provided that the misdescription was contained in the

written contract and that compensation can be fairly assessed. If the misdescription was not contained in the written contract, the purchaser's only remedy is rescission. If the misdescription was contained in the written contract, but compensation cannot be fairly assessed, the purchaser may [at his option] rescind [or accept an indemnity (P)].

4. Even if compensation is refused on the ground that it cannot be assessed, the purchaser is entitled to have the contract completed as far as the vendor can complete it.

Strictly speaking, the words "abatement of purchase-money" should be used instead of "compensation"; but the ordinary phraseology may be retained, as there is no ambiguity in it.

The words "essential" and "non-essential" in the above rules are defined below, p. 102.

In the rules above enumerated the word "misdescription" includes not only errors and misrepresentations, but undertakings which cannot be carried out, and defects in title which cannot be removed. See, also, as to what misdescription will entitle the purchaser to relief, Chapters I. to XI., concisely stated at p. 1. See, too, Chapters XV. and XVI. as to the relief consequential on rescission, and Chapter XVIII. as to the means of assessing compensation. As to rule 4, above, see per Lord Eldon in *Wood v. Griffith*, 1 Sw. 43, at p. 54, and per Lord Redesdale in *Harnett v. Yeilding*, 2 Sch. & Lef. 549, at p. 554.

CHAPTER XIII.

WHEN THE VENDOR WILL BE COMPELLED TO MAKE GOOD HIS
DESCRIPTION OR REPRESENTATION.

THE purchaser can, if he asks for relief before the conveyance is executed, compel the vendor to make good any errors or representations contained in the written contract, if it be possible for the vendor to do so, except in the cases mentioned below, of hardship, &c. The purchaser cannot compel the vendor to make good errors or representations contained in a parol statement not incorporated in the written contract, unless the vendor himself seeks to enforce the contract: see Chapter XXI.

Representa-
tion to be
made good.

Thus, if there is an undisclosed mortgage on the property, the purchaser is entitled to have the property conveyed to him and to have the purchase-money applied in paying off the mortgage. But if the undisclosed mortgage exceeds the purchase-money, the purchaser who insists on specific performance cannot claim, in addition to a gratuitous conveyance, payment to himself of such excess. See *Wedgwood v. Adams*, 8 Beav. 103, cited below, p. 100.

Mortgages.

A. and B. sold property as tenants in common for 200*l.*, describing it as subject to a mortgage for 400*l.* A., it was afterwards discovered, had no title, and B.'s moiety was subject to the whole mortgage. B. was compelled to convey his moiety without receiving any purchase-money, but he was not compelled to pay the purchaser the difference between the half of the purchase-money, *i.e.* 100*l.*, and the half of the mortgage money, *i.e.* 200*l.*, which the purchaser had not expected to fall on B.'s moiety. The purchaser was compelled to covenant to keep down the interest on the mortgage and to indemnify B.: *Horrocks v. Rigby*, 9 Ch. D. 180.

The Conveyancing Act, 1881, sect. 5, enabling the Court to provide for keeping down incumbrances by directing payment into

Conv. Act,
1881, s. 5.

Court of a sum to be invested in government securities, will probably not be enforced in sales out of Court on the application of the purchaser, if this would inflict a hardship on the vendor. See *Re Great Northern Railway and Sanderson*, 25 Ch. D. 788, where property sold for 868*l.* "free from incumbrances" was subject to a rent-charge of 63*l.*, to discharge which would have required a sum far exceeding the purchase-money. It is doubtful whether this section applies at all to a rent-charge secured on the land by Act of Parliament where the persons entitled to the rent-charge do not consent: *Ibid.*

Tithes.

The Court will not compel the vendor to purchase and convey the tithes when he has contracted to sell an estate as "tithe free": *Todd v. Gee*, 17 Ves. 273.

Hardship.

If the amount of undisclosed incumbrances on the property exceeds the purchase-money, the purchaser will not be entitled to compel the vendor to remove them: *Wedgwood v. Adams*, 8 Beav. 103 (where the vendors were trustees for sale).

If trustee-vendors, ignorant of the amount of incumbrances upon the property, personally undertake to clear off all incumbrances, the Court will not compel them to carry out their undertaking: *Ibid.*

In addition to the cases of hardship mentioned above, the Court refused on the ground of hardship to enforce the contract against the vendor in the following instances:—

Forfeiture.

Where the vendor undertook to make a road over other property, but it was found that he could not do so without incurring the risk of a forfeiture of part of his property, which he held under a lease containing restrictive covenants: *Peacock v. Pension*, 11 Beav. 355.

Where the vendor discovered that he could not sell without forfeiting, under his father's will, half the purchase-money to his brother: *Faine v. Brown*, cited in argument 2 Ves. Sen. 307.

Disentailing.

The Court will not compel the vendor to execute a disentailing assurance, because the Fines and Recoveries Act (3 & 4 Will. IV. c. 74), s. 47, virtually forbids specific performance of a contract by a tenant in tail unless the contract is itself a disentailing assurance. See *Hilbers v. Parkinson*, 25 Ch. D. 200.

In a case decided before the Fines and Recoveries Act, a

tenant in tail in remainder who had contracted to sell an advowson to the incumbent, and had thereby induced the incumbent to build a better house than he would have done, was compelled to create a base fee and convey it to the purchaser, and to covenant to suffer a recovery on the death of the life tenant: *Lord Bolingbroke's case*, 1 Sch. & Lef. 19, n., quoted in 2 Ph. at p. 605.

Trustees of a turnpike road which, under the General Turnpike Act, 3 Geo. IV. c. 126, s. 39, was liable to pre-emption by the adjoining owner, were not allowed to allege their neglect to offer the land to such owner as a reason for refusing to convey it to a purchaser pressing for specific performance, although it was in evidence that the adjoining owner insisted on his rights: *Barrett v. Ring*, 2 Sm. & G. 43. It did not appear that the adjoining owner's rights would be prejudiced in any way by the sale, and the purchaser was content to take such interest as the vendors had, and did not ask for compensation.

The vendor will not be compelled to make good the error, if this would necessitate a breach of trust: see below, p. 134.

Statutory
duty conflict-
ing with sale.

Breach of
trust.

In *Re Chifferiel*, 40 Ch. D. 45, the Court refused to make the vendor pay the purchaser, by way of compensation, the expense of completing an incomplete road which the vendor had described as "made up." It does not appear that the purchaser asked the Court to compel the vendor to make good his description, but rather that he claimed compensation, and if he had received the money would not have expended it on completing the road. See, as to the assessment of compensation in that case, p. 154, below. It is submitted that the purchaser could have compelled the vendor to complete the road.

Roads.

CHAPTER XIV.

RESCISSION.

Essential
misdescription.

IN the absence of any previous agreement as to compensation, the Court will, at the desire of the purchaser, rescind the contract if there has been an essential misdescription, although the vendor would prefer to complete, giving compensation.

Definition.

An "essential misdescription" is one whereby the purchaser was induced to purchase something which but for such misdescription he would never have purchased at all: *Flight v. Booth*, 1 Bing. N. C. 370, at p. 377.

A "non-essential misdescription" is one the only effect of which was to induce the purchaser to give a higher price than he would otherwise have given.

The words "essential" and "non-essential" seem to me clearer and more accurate than "material" and "immaterial." Every misdescription is "material" if it has any effect at all on the purchaser; it is immaterial only if it did not influence or mislead the purchaser in any way. See pp. 49, 52.

The words used by the judges are "essential," "very material," "substantial," "substantially and materially different," "very exaggerated description," on the one side; and "non-essential," "small," "minute," "trifling," "little circumstances," "slight variation," "minor and subsidiary," and "infinitesimal," on the other.

Early cases.

In some of the earlier cases, which, however, were disapproved of by Lord Eldon in *Drewe v. Hanson*, 6 Ves. 675, at p. 678, specific performance, with compensation, was enforced against the purchaser where there had been an essential misdescription. But the practice of the courts has changed in this respect. This change is adverted to in *Re Arnold*, 14 Ch. Div. 270, by James, L. J., who says (*ibid.* p. 279): "Lord Eldon, in *Knatchbull v. Grueber* (3 Mer. 146), expressed his opinion that the Court was

becoming more and more in the habit of holding people to the contracts they had made, and not holding them to contracts that they had not made, and I hope that the court will continue in that course. There is no doubt that if a man purchases a property, and what I may call an infinitesimal portion cannot be given him, then he may be obliged to complete with compensation; and here there is a condition which would oblige him to complete with compensation in such a case. But it has never been held that a man is obliged to take a thing with compensation when the thing is substantially and materially different from that which he was induced by the representations made to him to believe that he had bought."

The illustrations given below, pp. 105 to 117, show what is an essential misdescription. But the essentiality of a misdescription is not necessarily determined in the abstract. The Court has regard to the purchaser's desire at the date of the contract, *e. g.*, his intention to use the land in a particular way, and to his position, *e. g.*, as the owner of adjacent land.

In *Magennis v. Fallon*, 2 Mol. 561, it is said, "There is now no case which is of authority deciding that in case of contract for a particular object, having in the eye of the purchaser a particular value from circumstances not capable of pecuniary compensation, the purchaser can be compelled to perform it if these be taken away." In the case of *Lord Brooke v. Rounthwaite*, 5 Hare, 298, the Court took into consideration the fact that the purchaser was a timber merchant and had bought the estate for the sake of the timber trees. Where the misdescription is one which ordinarily would be treated as non-essential, the terms of the agreement may show that it is essential.

Conversely, a matter ordinarily treated as essential may by the circumstances attending the contract be shown to be non-essential to the particular purchaser. Thus, in *Smith v. Tolcher*, 4 Russ. 302, the absence of any mention of tithes in the preliminary correspondence was held to show that the great tithes, which were expressly included in the formal contract, were not essential in the purchaser's eyes.

If the misdescription is obviously essential, the burden of proof lies on the vendor to show that it was not essential to the pur-

Essentiality
not abstract.

Burden of
proof.

chaser. If it is not one which is obviously essential, the burden lies on the purchaser to prove the special circumstances which made it essential to him. This seems to be the principle deducible from the cases cited below, and also from the cases on the proof of the materiality of a misdescription, see Chapter VI. pp. 50—52. But in *Ayles v. Cox*, 16 Beav. 23, where freehold property was sold under the description of "copyhold," Lord Romilly held the misdescription to be essential, notwithstanding that the purchaser had no special reason for preferring copyhold. "It is unnecessary" he said, "for a man who has contracted to purchase one thing, to explain why he refuses to accept another." If this were correct, every misdescription would be held to be essential if the purchaser wished to rescind the contract.

Purchaser
buying in
name of
agent.

If the purchaser has employed an agent to purchase, and such agent has bought in his own name, the agent or nominal purchaser may take any objection which the principal or real purchaser could have taken if he had been the nominal as well as real purchaser. For instance, he may show that a deficiency of a portion of the property sold is "essential," on the ground of its position with regard to the real purchaser's other property: *Re Arnold*, 14 Ch. Div. 270.

Enquiry.

Sometimes the Court directs an enquiry whether the deficiency is material or not. This was done in *Evance v. Hogg*, 1805, A. 440; (see *Seton*, p. 1314); *McQueen v. Farquhar*, 11 Ves. 467; (see *Pemberton on Judgments*, p. 431); *Stewart v. Marquis of Conyngham*, 1 Ir. Ch. R. 534: see, too, per Lord Hatherley in *Richardson v. Smith*, 5 Ch. App. at p. 652.

More frequently the Court decides the essentiality of the deficiency or misdescription at the hearing.

Illustrations
of essentiality.

The cases illustrating what are and what are not essential misdescriptions may be conveniently classified according as the misdescription affects—

1. The identity of the property.
2. The tenure, *quantum* of vendor's estate, or nature of vendor's interest.
3. The size or extent.
4. The situation and physical conditions.

5. The incumbrances, contingencies, and liabilities affecting the property.
6. The rent or profits produced by it.

1.—*Identity.*

A misdescription affecting the identity of the property is *Identity.* essential. Where a house numbered 2 was described as "No. 4," the purchaser recovered his deposit at law, although No. 2 was the same sort of house as No. 4 and in better repair: *Leach v. Mullett*, 3 Car. & P. 115.

2.—*Tenure, &c.*

Misdescriptions affecting the tenure, the *quantum* of the *Tenure.* vendor's estate, or the nature of the vendor's interest, are, as a general rule, essential.

Thus, where the vendor had only a term of 2,000 years in- *Leasehold.* stead of the freehold: *Fordyce v. Ford*, 4 Bro. C. C. 494, cited 9 Ves. 368 and 13 Ves. 78; or even a mortgage term for 4,000 years which had been foreclosed: *Drewe v. Corp*, 9 Ves. 368.

Where the vendor's land is of copyhold tenure and he has *Copyhold.* described it as freehold, the misdescription is essential: *Hart v. Swaine*, 7 Ch. D. 42. Similarly, if without mentioning the tenure he has by agreeing to "grant and convey" implied that it is freehold (*Hick v. Phillips*, Prec. in Ch. 575), or has offered it for sale without mentioning the tenure, inasmuch as an agreement to sell land *simpliciter* implies that the land is freehold.

If, however, the fines, reliefs, and heriots are fixed and *Nominal fines.* nominal, and the right to the minerals and timber is in the tenant, the misdescription would seem to be non-essential; and where the vendor had made such misdescription innocently and without any intention to enhance the price, and the purchaser had been guilty of delay, specific performance was decreed with compensation for the difference in value (if any): *Price v. Macaulay*, 2 De G. M. & G. 339.

Where land is described as freehold which has been formerly *Enfranchised copyhold.* copyhold, but enfranchised under the Copyhold Enfranchisement Acts, so that the right to the minerals is reserved to the lord, the

misdescription is essential: *Upperton v. Nickolson*, 10 Eq. 228; 6 Ch. 436.

Freehold
called "copy-
hold."

Where freehold property was described as "copyhold, equal in value to freehold," the error was considered non-essential: *Twining v. Morrice*, 2 Bro. C. C. 326, at p. 331. In the case of *Ayles v. Cox*, 16 Beav. 23, the description of freehold land as "copyhold" was considered as essential; but this decision appears doubtful, as it is opposed to *Twining v. Morrice*, and seems wrong on principle, unless it were shown that the purchaser had some special motive for preferring copyhold to freehold. In itself freehold is necessarily at least as valuable as copyhold, if not more valuable, and the purchaser could not have been induced by the misdescription to give more than he would have given, or to purchase property which he would not have purchased, had there been no misdescription; so that so far from being entitled to rescind, it would appear that he was not even entitled to compensation. If the description had led the purchaser to think that he was purchasing some other piece of land, then the misdescription would have been essential, as it would have misled him as to the identity (see p. 105, above).

A stipulation, on the sale of property described as copyhold, "if it should appear that any part is freehold, then this agreement to be void," will be enforced by the Court at the instance of the purchaser: *Daniels v. Davison*, 16 Ves. 249.

Underlease.

The description of an underlease as a "lease" was treated as essential in *Madeley v. Booth*, 2 De G. & S. 718 (and also in *Law v. Urlicin*, 16 Sim. 377; *Hayford v. Criddle*, 22 Beav. 477, at p. 480, and *Re Beyfus & Masters*, 39 Ch. Div. 110).

The decision in *Madeley v. Booth* was disapproved of by Jessel, M.R., in *Camberwell Building Society v. Holloway*, 13 Ch. D. 754, at p. 760; but previous remarks in the same judgment are inconsistent with this disapproval. In *Darlington v. Hamilton*, Kay, 550, pp. 557, 558, Page-Wood, V.-C., doubted whether the purchaser could resist specific performance "simply upon the ground of there being another lease for years interposed between him and the freehold." But the decision of the Court of Appeal in *Beyfus & Masters* now clearly establishes that the purchaser can rescind if the vendor has described as a lease that which

is only an underlease. Of course, if the purchaser knows or has notice that it is an underlease, the misdescription, so far from being essential, would not entitle him to any relief at all (see Chapters VI. and VII.).

Where the property described as "held under a lease," or as "the remainder of a lease," is held under a derivative lease, Derivative lease. i. e., where the original lease comprises other property as well as the property comprised in the underlease, the whole being subject to general covenants and a power for re-entry for the breach of any of them, the misdescription is essential: *Darlington v. Hamilton, Kay, 550.*

The purchaser in such a case is exposed to forfeiture by the act or omission of another over whom he has no control. The Conveyancing Act, 1881, s. 14, which gives the lessee the opportunity of making good the breach, does not affect the point, because the purchaser of a derivative lease has no power to compel the lessee or sub-lessee of the rest of the property comprised in the original lease to avail himself of the opportunity afforded him by that section: *Cresswell v. Davidson*, 56 L. T. N. S. 811. Similarly on a contract to grant a lease; thus, in *Fildes v. Hooker*, 3 Mad. 193, where the sub-lessee of a house, which was included with five others in a head lease, and subject to general covenants and proviso for re-entry, contracted to grant a twenty-one years' lease, the intending lessee was allowed to rescind and not compelled to complete with an indemnity. See also *Warren v. Richardson*, You. 1.

On the sale of an agreement for a lease, if the vendor has only a voidable agreement the defect is essential: *Brewer v. Broadwood*, 22 Ch. D. 105. Voidable lease.

On an agreement to grant a lease, if the lessor can only give an equitable lease, this is an essential defect: per Leach, M. R., in *Hanbury v. Litchfield*, 2 Myl. & K. 629. There, however, an agreement to grant a lease for thirty-one years was enforced with compensation, although the lessor could grant a legal lease for twenty-one years only, with a covenant to grant a further lease for ten years, there being special circumstances, owing to the expense which the lessee had incurred in building, and which he sought to recover, by praying for a declaration that he Equitable lease.

was entitled to a mortgage for the amount, and that the property should be sold to repay him: *Reg. Lib.* 1833, A. 1389.

A contract to assign an existing lease is not satisfied by a grant of a new lease direct to the purchaser, because the purchaser's liability would be greater as original lessee than as assignee: *Mason v. Corder*, 2 Marsh. 332.

Where land was described as "in the joint occupation of A. and B. as lessees," the fact being that C. was the lessee, A. an assignee from him, and A. and B. in occupation, but not in occupation as lessees, the misdescription was treated as essential: *Ridgway v. Gray*, 1 Mac. & G. 109.

The description of a perpetual rent-charge as "freehold, subject to a perpetual rent-charge," is an essential misdescription: *Prendergast v. Eyre*, 2 Hogan, 81. Where a sum in gross paid for the user of land as a pleasure ground, and secured by a personal covenant, was put up for sale under the description "freehold ground rents," the error was treated as essential: *Evans v. Robins*, 8 Jur. N. S. 846; 10 *ibid.* Exch. Ch. 473.

Redeemable
annuity.

If on the sale of an "annuity payable out of bridge tolls," no mention is made of the fact that the annuity is redeemable, this omission is probably essential: *Coverley v. Burrell*, 5 B. & Ald. 257, where, however, nothing was said about compensation.

The description "redeemed land tax, amounting to 3*l.* 14*s.*, charged on three houses," the fact being that there were separate sums of 1*l.* 12*s.*, 1*l.* 1*s.*, and 1*l.* 1*s.* charged on the separate houses, is an essential misdescription, and one for which compensation is not capable of computation: *Cox v. Coventon*, 31 Beav. 378.

It is a non-essential misdescription to describe a right of common for sheep as a "right of common" simply: *Howland v. Norris*, 1 Cox, 59.

The following defects have been held to be essential:—

Reversion.

When the vendor's interest instead of being an estate in possession is a reversion expectant on a lease for a life or lives: *Collier v. Jenkins*, You. 295; *Linehan v. Cotter*, 7 Ir. Eq. Rep. 176;

Or is a life estate instead of the fee: *Ex parte Riches*, 27 Life estate. Sol. J. 313;

Or a life estate with remainder in fee, subject to an intervening estate tail: Sug. 308.

On the sale of a leasehold interest, a trifling deficiency in the length of the term is non-essential. The following decisions and dicta illustrate what is regarded by the Courts as a trifling deficiency. Length of term.

A deficiency of two years out of ninety-nine: per Lord Erskine in *Halsey v. Grant*, 13 Ves. at p. 77.

A deficiency of three months out of twenty-one years: per Lord Eldon in *Mortlock v. Buller*, 10 Ves. at p. 305.

A deficiency of five months in a term of eight years: *Behcorth v. Hassell*, 4 Campb. 140 (a common law action, in which the vendor obtained damages from the purchaser for refusing to complete).

On the other hand, a deficiency of nine months out of twenty-one years was held to justify the purchaser in rescinding: *Forrer v. Nash* (according to the report in 35 Beav. 167; the point is not mentioned in the report of the same case in 14 W. R. 8, and 11 Jur. N. S. 789). But it does not appear that the vendor was willing to give compensation.

If the vendor has contracted to sell the entirety, but has only undivided parts of the estate, the defect is essential: *Dalby v. Pullen*, 3 Sim. 29, affirmed 1 Russ. & M. 296. (See below, p. 110.) Undivided part.

3.—Quantity.

The misdescription or defect in title may affect the size or quantity of the property; that is, the acreage may be less than is stated in the particulars, or the vendor may have no title to part of the property, or some part, *e.g.* a house, may not be in existence, or the title deeds may show a title to fewer acres than the vendor has contracted to sell. The misdescription will be treated as essential (a) if the deficiency is large in proportion to the whole quantity contracted to be sold; or (b) if the part which is wanting is necessary to the enjoyment of the residue, or possesses some special value in the purchaser's eyes; or

(c) would, if possessed by another, be liable to affect the purchaser's enjoyment of the residue.

Acreage.

(a) A deficiency of $4\frac{1}{2}$ out of 30 acres was treated as essential in *Shackleton v. Sutcliffe*, 1 De G. & Sm. 609; and a deficiency of 11 out of 70 acres would probably be essential: per Lord Eldon in *Osbaldiston v. Askew*, 2 Jac. & W. 539. But the following were treated as non-essential:—

A deficiency of 2 out of 186 acres: *Calcraft v. Roebuck*, 1 Ves. jun. 221.

A deficiency of 6 acres out of an estate which was sold for 14,000*l.*: *McQueen v. Farquhar*, 11 Ves. 467 (but nothing was said about compensation in the judgment).

A deficiency of 26 out of 217 acres: *Hill v. Buckley*, 17 Ves. 394.

Of 5 out of 41 acres "by estimation": *Winch v. Winchester*, 1 Ves. & B. 375.

Where there was said to be 14 acres of "meadow," and 2 were not meadow: *Scott v. Hanson*, 1 Sim. 13.

Where the property was described as containing 46 feet in depth, but really contained only 33: *King v. Wilson*, 6 Beav. 124 (but there the purchaser was tenant in possession, and either knew the depth, or did not care what the depth was).

Undivided
part.

As a rule, if the deficiency consists not of the acreage being less, but of there being no title to an undivided part of the property, the deficiency, unless very minute, would be essential.

Where, having contracted to sell two-sevenths of an estate, the vendor could only show a title to one-seventh, the defect was held essential: *Roffey v. Shallcross*, 4 Madd. 227.

Similarly, where having contracted to sell the entirety, the vendor could only show a title to six-sevenths: *Dalby v. Pullen*, 3 Sim. 29; affirmed, 1 Russ. & My. 296.

Essential
portion.

(b) In *Evance v. Hogg* (Seton, p. 1314), an inquiry was directed "whether such part (if any) of the said estate to which the plaintiff cannot make a good title be material to the enjoyment of the remainder." In *Robinson v. Musgrove*, 2 Moo. & R. 92, it was said: "Deficiency in the value may be fit matter of compensation, but not the total absence of one of the things sold."

In the following cases the part wanting was held to be material to the enjoyment of the remainder:—

Coach-house and stable, on sale of a “freehold house and Stable. garden with a coach-house and stable”: *Turner v. Turner*, W. N. 1881, p. 70.

On the sale of a leasehold house and yard, the fact that the Yard. yard was not comprised in the lease, but held from year to year, at a separate rent, was held to be an essential defect: *Dobell v. Hutchinson*, 3 Ad. & E. 355.

On the sale of a wharf and jetty, where the vendor had no Jetty. title to the jetty: *Peers v. Lambert*, 7 Beav. 545. In *Drewe v. Hanson*, 6 Ves. 675, at p. 678, Lord Eldon disapproved of an earlier case where, on a contract for a house and wharf, the vendor having no title to the wharf, the purchaser was held bound to take the house without the wharf: see also his remarks in *Seton v. Slade*, 7 Ves. 270; and *Halsey v. Grant*, 13 Ves. 73.

On the sale of a house and four acres, the fact that the vendor Frontage. had no title to a strip of land forming the frontage to the highway was held an essential defect: *Perkins v. Ede*, 16 Beav. 193.

In *Re Arnold*, 14 Ch. Div. 270, where a farm of forty-two acres was offered for sale, the plan showing one of the parcels as a narrow close having a long frontage to a high road, and one part of the particulars describing it as seven and another as four acres, the facts being that the close contained seven acres, but the vendors were only entitled to four undivided one-sevenths, the purchaser was held not bound to accept an arrangement which the vendors made with the owner of the other three-sevenths to give him four acres out of another close, parcel of the same farm, and also abutting on a road, in exchange for his three-sevenths, nor bound to complete with compensation.

Even a small deficiency is essential if it makes the property useless for the purpose for which the purchaser bought: *In re Deptford Creek Bridge Co. and Beavan's Contract*, 27 Sol. J. 312; 28 *Ib.* 327.

The rules relating to compensation for misdescription apply Fixtures. equally to the case where part of the property agreed to be sold, *e.g.* fixtures or furniture, is to be paid for at a valuation, and no valuation is made: see Chap. XXV. p. 187.

Sale in lots. On a sale in lots, a purchaser who buys two lots may, if the title to one lot is defective, rescind as to both lots if the lot with the defective title is necessary to the enjoyment of the other lot, but not otherwise: see *Poole v. Shergold*, 1 Cox, 273; and *Ex parte Tilsley*, mentioned in 4 Madd. 227, note.

Conjectural liability. (c) The liability above mentioned must be probable, a mere distant, fanciful or conjectural liability would not be sufficient: *Knatchbull v. Grueber*, 1 Mad. 153.

In that case, a mansion and 700 acres were sold, and the vendor had no title to twelve acres, which were opposite the park gates, and contained brick earth, so that it was probable that they would be built on; this was considered such a defect as entitled the purchaser to rescind.

4.—Physical Condition.

The misdescription or defect in title may be in a matter relating to the situation of the property or some other physical condition: *e.g.*, its state of repair.

Situation. A house near Pall Mall was described as *in* Pall Mall; the misdescription was held to be essential: *Stanton v. Tattersall*, 1 Sm. & Gif. 529. Similarly, where the distance from a town was three times as great as represented by the vendor: *Duke of Norfolk v. Worthy*, 1 Camp. 337.

County. Where an estate on the Essex side of the river, but really in Kent, was described as being in Essex, the purchaser was compelled to complete, although his object was to become a freeholder of Essex: *Shirley v. Davis*, cited but disapproved of by Lord Eldon in *Drewe v. Hanson*, 6 Ves. 678; and see note in *Shirley v. Stratton*, 1 Br. C. C. 440.

Cultivation. The description of land which is uncultivated as "land in a high state of cultivation," is a non-essential error: *Dyer v. Hargrave*, 10 Ves. 505.

Ring fence. The description "within a ring fence," when the fields are scattered, is an essential misdescription: *Ibid.*

"Brick-built." The description "brick built," in the case of a house which was partly of brick, partly of timber, and partly of lath and plaster, was held to be essential: *Powell v. Double*, Sug. (ed. 14) p. 29.

Repairs. Misdescription as to the state of repair of a house is non-

essential unless the house is wanted for immediate residence : *Dyer v. Hargrave*, 10 Ves. 505. The decision to the contrary in *Loyes v. Rutherford*, Sug. 331, would probably not be followed. In *Grant v. Munt*, G. Coop. 173, dry-rot was treated as a non-essential defect, and compensation was awarded.

Ornamental timber is an essential matter in the case of the Timber. purchase of a residential estate : *Magennis v. Fallon*, 2 Mol. 561, at p. 590. Ordinary timber is, in the absence of any special intention on the purchaser's part, a non-essential matter : *Ibid.* In *Stewart v. Marquis of Conyngham*, 1 Ir. Ch. Rep. 534, it was referred to the Master to inquire whether the right to the timber (being ordinary timber) on a small portion of the estate was material. If the purchaser is a timber merchant, buying for the sake of cutting the timber, the absence of even ordinary timber would be an essential matter : *Lord Brooke v. Rounthwaite*, 5 Ha. 298. In ascertaining whether the timber is ornamental, the Court is not restricted by the definition ("timber planted and growing or standing for ornament") given in the case of an action against tenant for life without impeachment : *Magennis v. Fallon*, 2 Mol. 561, at p. 588. And the Court will not go into the *quantum* of despoliation of ornament ; the destruction of one beautiful tree would be sufficient. The question is, Does it admit of pecuniary compensation ? *Ibid.* p. 590.

The description of property as being well supplied with water, ^{Water} the fact being that there is only an artificial supply from a ^{supply.} waterworks company, upon payment of a heavy annual rate, is an essential misdescription : *Leyland v. Illingworth*, 2 De G. F. & J. 248. So, too, the description of a dwelling-house as having "a plentiful supply of good water," if the supply is intermittent, or the right to the supply is subservient to the right of another person : *Bird v. Andreu*, 4 Times L. R. 31.

A misdescription as to the extent of frontage, especially if the ^{Frontage.} purchaser has bought with the intention of building, is essential. In *Brewer v. Brown*, 28 Ch. D. 309, the description was "enclosed by a wall, with tradesman's entrance"; the wall which abutted on a road did not belong to the vendor, and the entrance was only used on sufferance. The purchaser had intended to build cottages on the property fronting the road. The misdescription was held to be essential.

5.—*Incumbrances, Contingencies and Liabilities affecting the Property.*

Tithes.

Where land is sold "tithe free," the liability to tithe or tithe rentcharge is, in the absence of special circumstances, an essential matter. The rule is now established "that a man who agrees to purchase a landed estate, which is described to be tithe free, shall not be compelled to complete his purchase if it turns out that the land is subject to tithe:" per Leach, M. R., in *Smith v. Tolcher*, 4 Russ. 302, at p. 305. The cases of *Lowndes v. Lane*, 2 Cox, 363, and *Howland v. Norris*, 1 Cox, 59, deciding the contrary, are no longer binding authorities. The latter case was disapproved of by Lord Eldon in *Drewe v. Hanson*, 6 Ves. 678, and *Seton v. Slade*, 7 Ves. 270, and by Lord Erskine in *Halsey v. Grant*, 13 Ves. 78. If the matter were still open for discussion, it might very well be argued that the existence of a tithe rent-charge is not in itself an essential defect, and that the onus of proving its essentiality in the purchaser's mind should lie on the purchaser. As the matter stands at present, the misdescription is treated as essential, unless the vendor can show from the circumstances of the contract that it was not essential to the mind of the purchaser. In *Binks v. Lord Rokeby*, 2 Swa. 222, where only one-fourth of the estate was described as tithe free, the purchaser was forced to complete with compensation, because he was considered to be precluded from arguing that freedom from tithe was an essential point, since he was at the same time purchasing land which he knew was not tithe free. In *Smith v. Tolcher*, 4 Russ. 302, liability to great tithes, was held to be non-essential under the following circumstances:—The estate consisted of a mansion-house and seven acres of pasture, and it was very improbable that any great tithes would arise, and the "great tithes," though inserted in the formal agreement, were not mentioned in the preliminary correspondence.

Incumbrances.

The general rule as to incumbrances is, that where there is an irremovable incumbrance, which is large compared with the value of the property, *e. g.*, an incumbrance amounting to half the purchase-money, the purchaser cannot be compelled to complete. See per Lord Eldon, in *Wood v. Bernal*, 19 Ves. 220, at p. 221, who adds, "Where there is a small incumbrance upon a considerable estate, the question as to indemnity, if the estate will still

be marketable, is widely different." See, as to indemnity, Chap. XIX. p. 155.

Thus, a large rent-charge, viz., 600*l.*, was treated as an essential defect in *Portman v. Mill*, 1 Russ. & M. 696. But small rent-charges are non-essential: per Leach, V.-C., in *Esdaile v. Stephenson*, 1 Sim. & St. 122. In *Halsey v. Grant*, 13 Ves. 73, a rent-charge of 19*l.* 6*s.*, and other small charges, were considered non-essential, as it appeared that other property, not the subject of the sale, was also subject to and amply sufficient to bear those charges, and would probably be first resorted to. In *Pope v. Garland*, 10 L. J. (N. S.) Ex. Eq. 13, at p. 16, Alderson, B., said that if the ground rent was more than the vendor had stated, it would only be a subject for compensation.

A distinction has been drawn between quit-rents and rent-charges. Leach, V.-C., in *Esdaile v. Stephenson*, 1 Sim. & St. 122, says: "It is now settled that quit-rents are subjects of compensation, probably because they are incidents of tenure." The reason may perhaps be that quit-rents are invariably small, and therefore come within the rule stated above.

The absence of title to the minerals is an essential defect: *Upperton v. Nickolson*, 6 Ch. 436. *A fortiori*, the fact that the property is subject to rights of mining vested in other persons. If, however, there are no minerals, so that the right of mining cannot be exercised, the case might be different. See *Martin v. Cotter*, 3 J. & L. 496, at p. 509. The fact that the property is subject to rights of common is an essential defect. See *Gibson v. Spurrer*, Peake, Add. Cas. 49; *Vancouver v. Bliss*, 11 Ves. 458. The existence of a right of way is an essential matter, especially if the land was sold as "a first-rate building plot of ground": *Dykes v. Blake*, 4 Bing. N. C. 463. Where four and a-half out of thirty acres contracted to be sold, and described as "eligible for building purposes," were subject to an undisclosed easement, namely, an underground watercourse, which third parties had liberty to open, cleanse, and repair, making compensation for any damage thereby occasioned, this was held to be an essential defect: *Shackleton v. Sutcliffe*, 1 De G. & S. 609.

The fact that the land is subject to a right of sporting would probably be treated as an essential defect, and one for which

compensation could not be assessed : *Burnell v. Brown*, 1 Jac. & W. 168, at p. 172.

Restrictive covenants.

Restrictive covenants, if undisclosed, are essential defects. In *Cato v. Thompson*, 9 Q. B. Div. 616, a covenant against using a house as a shop, &c., was held to be an essential matter. "It is almost impossible to assess compensation for covenants of this nature": per Jessel, M. R., *ibid.* p. 618; see also *Flight v. Booth*, 1 Bing. N. C. 370; *Vignolles v. Bowen*, 12 Ir. Eq. R. 194, 196; and *Phillips v. Caldcleugh*, L. R. 4 Q. B. 159.

On the sale of leasehold property, a non-disclosed covenant contained in the lease to build thirty-four additional houses, to keep in repair the houses built and to be built, and to deliver them up at the end of the term, was held to be an essential defect: *Nouaille v. Flight*, 7 Beav. 521.

If the lease of a public-house contains a proviso that the lessee and his assigns should take all their beer from a particular brewery, the description of the property as a "free public-house" would be an essential misdescription: *Jones v. Edney*, 3 Camp. 285.

Other liabilities.

The following are additional instances of essential defects:—

The liability to keep up fences, watercourses, &c., on the land sold: *Larkin v. Lord Rosse*, 10 Ir. Eq. 70.

The burden of repairing the chancel of the parish church: *Forleblow v. Shirley*, cited in argument, 2 Sw. 223.

The fact that the land is liable to compulsory purchase under a private Act of Parliament: *Ballard v. Way*, 1 M. & W. 520.

Reversion.

On the sale of a reversion expectant on the death of A. without children, a misrepresentation of A.'s age is essential: *Sherwood v. Robins*, Moo. & Mal. 194. A., in that case, was a man aged sixty-four years, and he was described as aged sixty-six. Probably if A.'s actual age had been such as to reduce the contingency of the birth of children to an impossibility, as, for instance, if A. were a woman aged sixty-four, or even only sixty, the misstatement of A.'s age might be made a subject of compensation, and in that case would not be treated as essential.

Profits.

A misdescription of rental or annual profits, &c., is generally treated as non-essential.

In *Cuthbert v. Baker*, Reg. Lib. A. 1790, fol. 442, quoted in

Sug. (ed. 14), p. 313, the statement that the quit-rents of a manor amounted to 2*l.* a-year, when they were in reality only 1*l.* 10*s.* a-year, was held to be non-essential.

An overstatement of the profits of a colliery was treated as non-essential in *Powell v. Elliot*, 10 Ch. 424; and see below, p. 147.

The description of rack-rent as ground rent was held to be essential in *Stewart v. Alliston*, 1 Mer. 26. The case of *Dimmock v. Hallett*, 2 Ch. 21 (where a misstatement of the occupation rent was treated as essential), proceeded on the ground of fraud or want of *bona fides*: see p. 83.

The case of *Lachlan v. Reynolds*, Kay, 52, was not a mere misstatement of rent. The vendors there had described the property as "at present in the occupation of C. at a rental of 42*l.*," the fact being that C. was in occupation adversely to the vendors, and that possession could only be recovered from her by ejectment. It was held that the misdescription was essential, and that the purchaser could not be compelled to complete conditionally on the vendors ejecting C. and giving the purchaser compensation in the meantime for the objects he had in view in purchasing. The real question in that case was whether the Court should relieve the vendor against the stipulation as to the time for completion.

Where the misdescription, defect in title, incumbrance or liability, affects not the whole estate sold, but only a portion, the essentiality of the misdescription, &c., depends on two questions: (1) is the defect an essential one as regards that portion? (2) if so, is that portion essential as regards the enjoyment of the whole property? The answer to the first question would probably be found in one of the decisions recorded under the headings 2, 4, 5 and 6, above; that to the second under heading 3.

Misdescription affecting portion only.

On the sale of 30 acres, it turned out that 4½ acres were subject to an undisclosed easement, viz., an underground water-course, which third parties had the right of opening and repairing. As the land was sold as "building land," the easement was an essential defect as regarded the 4½ acres, and the consequent deficiency of these 4½ acres was considered to be

essential to the whole property : *Shackleton v. Sutcliffe*, 1 De G. & Sm. 609.

Resisting
specific per-
formance.

In any case in which the purchaser is entitled to rescind, he will, of course, have a good defence to an action by the vendor for specific performance. And it is often said that a purchaser may sometimes successfully resist the vendor's action for specific performance without being entitled to rescind. Thus, Lindley, L. J., in *Re Terry and White*, 32 Ch. Div. 14, at p. 29 : "It is well known that a less serious misleading is sufficient to enable a purchaser to resist specific performance than is required to enable him to rescind the contract." So, Jessel, M. R., in *Re Banister*, 12 Ch. Div. 131, at p. 142 : "I apprehend that the considerations which induce a Court to rescind any contract, and the considerations which induce a Court of Equity to decline to enforce specific performance of a contract, are by no means the same. It may well be that there is not sufficient to induce the Court to rescind the contract, but still sufficient to prevent the Court enforcing it."

"A decree for specific performance is not matter of absolute right ; and therefore, whenever the Court sees that such a decree might work an injustice, it holds itself at liberty to refuse its aid, and to leave the party to seek his remedy at law. It may be difficult to state beforehand all the cases in which the Court will thus withhold its assistance. It certainly will do so whenever there has been anything like fraud or circumvention in procuring the concurrence of the defendant in the contract sought to be enforced. Indeed, in those cases, even at law, there is generally a valid defence. But without anything amounting to actual fraud, where there has been mistake or surprise on the part of the defendant, this Court frequently refuses to act, and leaves the plaintiff to his legal remedy:" per Lord Cranworth, L. C., in *Myers v. Watson*, 1 Sim. N. S. 523, at p. 528.

Fraud.

If there has been fraud on the part of the vendor, the purchaser is entitled to rescind, even though the vendor is willing and able to make good his representation : *Rawlins v. Wickham*, 3 De G. & J. 304.

CHAPTER XV.

RETURN OF DEPOSIT.

IN addition to rescission of the contract, the purchaser is entitled, **Deposit.** in the absence of an express stipulation to the contrary, to have his deposit returned.

He may recover the deposit as money had and received for **Procedure.** his use :

—(i) in an action by the vendor for specific performance which is dismissed on the ground of misrepresentation or defective title (*Turner v. Marriott*, 3 Eq. 744); but probably not in one dismissed for a “doubtful” title: *Nottingham, &c. v. Butler*, 16 Q. B. Div. at p. 787;

—or (ii) in an action by the purchaser for rescission: *Torrance v. Bolton*, 8 Ch. 118;

—or (iii) in an action by the purchaser for damages;

—or (iv) under a vendor and purchaser summons (*Re Hargreaves & Thompson*, 32 Ch. Div. 454), even when the summons has been taken out by the vendor (*Higgins and Percival*, 59 L. T. N. S. 213); but not where the ground for relief is the vendor’s misrepresentation (*Re Davis and Carey*, 58 L. J. Ch. 143; but *qu.*, see remarks on that case below, p. 130);

—or (v) in an action by the purchaser for partial performance, with abatement of purchase-money, which fails merely on the ground that the amount of abatement cannot be assessed: *Westmacott v. Robins*, 4 D. F. & J. 390; but not in an action by the purchaser for specific performance: *Aylett v. Ashton*, 5 L. J. (N. S.) Ch. 71.

If the purchaser has given a cheque for the amount of the **Cheque.** deposit, any ground on which he could recover the deposit if paid in cash is a good ground of defence in an action upon the cheque: *Mills v. Oddy*, 6 Car. & P. 728.

Where the title is merely “doubtful” (see p. 191), and the **Doubtful** vendor has not been guilty of any fraud or misrepresentation, it **title.**

would seem that the purchaser is entitled to rescind or to resist specific performance, but not to recover the deposit: *Nottingham, &c. v. Butler*, 16 Q. B. Div. at p. 787.

Interest.

Where the deposit is ordered to be returned, the Court orders payment of interest thereon at the rate of 4l. per cent.: *Re Arnold*, 14 Ch. D. 270. No interest was allowed in *Lachlan v. Reynolds*, Kay, 52, on the ground that the deposit had not borne interest.

Even though the conditions of sale bind the purchaser to pay interest at 5l. per cent. in case of delay in completion, the Court will only allow the purchaser interest on the deposit at the rate of 4l. per cent.: *Re Arnold*, 14 Ch. Div. at p. 285.

And the purchaser is not entitled to any profit, nor liable for any loss which the vendor may have made by an investment of the deposit: *D'Oyley v. Powis*, 2 Br. C. C. 32, and *Ambrose v. Ambrose*, 1 Cox, 194. *Secus* on sale by Court, *Powell v. P.*, 19 Eq. 422.

Where the purchaser is charged with an occupation rent, interest at 4l. per cent. on the deposit will be allowed and set off against such rent: *Smith v. Jackson*, 1 Mad. 618.

Demand for deposit.

It does not seem necessary that the purchaser should first serve a demand on the vendor under 3 & 4 Will. 4, c. 42, s. 28, as interest on the deposit would appear to come within the proviso at the end of that section as being one of the cases in which interest was payable by law. But Dart (p. 1076) appears to think that interest is not recoverable except after demand, referring to *Frühling v. Schroeder*, 2 Bing. N. C. 77. Dart's remarks apply, perhaps, only to actions for money had and received, and not to actions for damages, or any other form of procedure under which the deposit and interest thereon is sought to be recovered. *Qu.*, if demand is necessary in any case.

Lien.

The Court will grant the purchaser a lien for the deposit and interest and the costs of the proceedings for recovering the deposit, either in an action by the purchaser for rescission (*Torrance v. Bolton*, 8 Ch. 118; and see *Wythes v. Lee*, 3 Drew. 396); or in an action by the vendor for specific performance which is dismissed (*Turner v. Marriott*, 3 Eq. 744; see form of order there given); or in an action by the purchaser for specific

performance with compensation, which fails merely on the ground that compensation is unascertainable: *Westmacott v. Robins*, 4 D. F. & J. 390. Even on a summons taken out by the vendor the Court has given the purchaser a lien for the costs of the summons and the costs of investigating the title: *Higgins and Percival*, 59 L. T. N. S. 213.

If the deposit have been paid to the auctioneer, and nothing has been said about his being the vendor's agent, he is a stakeholder, and the purchaser may sue the auctioneer for the deposit. But if it has been paid to the auctioneer as the vendor's agent, or has been paid to the vendor's solicitor, or to the vendor himself, the purchaser must sue the vendor: *Edgell v. Day*, L. R. 1 C. P. 80. If the deposit has been paid to the vendor's solicitor expressly as a stakeholder, the purchaser may sue the solicitor for the deposit, *semble*: *ibid.*

Deposit in
hands of
auctioneer.

CHAPTER XVI.

DAMAGES.

Damages.
Damages for
loss of
bargain.

WHERE the purchaser is entitled to rescind he may usually recover damages from the vendor, an exception being sometimes made in cases of doubtful title, see p. 207. But, except in the case of the vendor's fraud or wilful default, the only damages recoverable will be the expenses of and incidental to the sale properly incurred by the purchaser; he will not be entitled to damages for the loss of his bargain.

Rule in
Flureau v.
Thornhill.

This rule is known as the rule in *Flureau v. Thornhill*, 2 W. Bl. 1078, a decision which has often been confirmed: see especially *Walker v. Moore*, 10 B. & C. 416, and cases there cited; *Pounsett v. Fuller*, 17 C. B. 660; and *Bain v. Fothergill*, L. R. 7 H. L. 158. The rule differs from that which governs a sale of chattels, where, if the vendor has no title, the purchaser can recover the difference between the price he agreed to give and the enhanced market value of the chattels. The reason for the distinction is that no layman can be supposed to know what is the exact nature of his title to real property, whether it be good against all the world or not: see *Bain v. Fothergill*, L. R. 7 H. L. 158.

So, too, Williams, J., in *Pounsett v. Fuller*, 25 L. J. C. P. at p. 152: "The position of the vendor of a real estate is difficult enough as the law now stands. His title may be supposed to be perfectly good until submitted to the scrutiny of some conveyancer for the purchaser, who applies all his experience and all his skill to pick holes in it. If a flaw is discovered, it is quite sufficient punishment for the vendor, in addition to that misfortune, to have to pay the expense of detecting it without being subject to the risk of a jury taking into their consideration the goodness of the bargain which the purchaser may suppose he has lost

from the undervalue put upon the estate by the vendor himself, and the result of which might be that the vendor would not only have the misfortune of finding that he had bargained to sell his estate under its value, but that he had to pay several thousand pounds in addition. I must say it would be an unwholesome state of the law if that were so." Another reason for the distinction given in *Bain v. Fothergill*, L. R. 7 H. L. 158, viz., that a man buys chattels to re-sell, but buys land to keep, seems less well founded.

The exceptions of fraud and wilful default will be considered lower down, p. 126.

An attempt was made in the case of *Hopkins v. Grazebrook*, 6 B. & C. 31, to add a further exception, viz., that if the vendor at the time of entering into the contract was not in possession of the land, and having merely contracted to purchase the land himself, did not know whether he had a title or not, the purchaser can recover damages for the loss of his bargain. In that case the vendor sold property which he had contracted to purchase, but which had not been conveyed to him, nor had he examined the title. It turned out that *his* vendor had no title, and the purchaser was allowed damages for the loss of his bargain. But *Hopkins v. Grazebrook*, though approved of in *Robinson v. Harman*, 1 Exch. 850, must be considered as overruled by *Bain v. Fothergill*, L. R. 7 H. L. 158, see pp. 206, 207, 212.

Vendor not in possession at time of contract.

In *Robinson v. Harman*, 1 Exch. 850, a tenant for life without power of leasing agreed to grant a lease, and assured the lessee that he had power to do so, well knowing that he had no such power. The lessee was allowed damages for the loss of his bargain. But here the lessor acted fraudulently, and the case came within the exceptions already established.

The rule in *Flureau v. Thornhill* was held not to apply in the case of a very special agreement, under which the defendants were to grant the use of an entrance to the plaintiff in consideration of a surrender of other leasehold premises by the plaintiff to the defendants. It appeared on the face of the agreement that the defendants had not yet got any title, and that no abstract of title was to be waited for, but that the plaintiff was forthwith to execute his part of the agreement, and that the

plaintiff, having executed his part, could not be afterwards restored to his original position. The plaintiff was allowed damages for the loss of his bargain: *Wall v. City of London Real Property Co.*, L. R. 9 Q. B. 249.

But if the purchaser knows beforehand of the defect in the vendor's title which may prevent the vendor from completing, he will not be allowed damages for the loss of his bargain: *Gas Light and Coke Co. v. Touse*, 35 Ch. D. 519, at pp. 541—543.

Vendor's
delay.

The rule in *Flureau v. Thornhill* also applies where the purchaser's complaint is the delay of the vendor to complete. If therefore, the delay is caused merely by the state of the vendor's title, the purchaser cannot obtain damages for the loss of any profits which he might have made had the vendor been ready to complete at once: see *Hyam v. Terry*, 25 Sol. J. 371, and *Rowe v. London School Board*, 36 Ch. D. 619, at p. 623.

If, however, the vendor's delay is wilful, damages for loss of bargain will be awarded: *Jaques v. Millar*, 6 Ch. D. 153.

Damages for
delay.

But a distinction has been attempted to be drawn between damages properly so called and damages by way of compensation, and in one case damages by way of compensation for partial loss of bargain were given, though the vendor had not been guilty of fraud or wilful default: *Royal Bristol, &c. v. Bomash*, 35 Ch. D. 390, see p. 396. This decision seems open to question. The case of *Jaques v. Millar*, 6 Ch. D. 153, there relied on, was a case of wilful default.

Expenses
recoverable.

The damages recoverable by the purchaser as the expenses of and incidental to the sale include (in addition to the recovery of the deposit with interest: see above, p. 119):—

Interest.

(a) Interest on the purchase-money, if reasonably kept unemployed pending the completion of the contract (*Sherry v. Oke*, 3 Dowl. 349, at p. 361); or interest paid by the purchaser on money borrowed by him to complete the purchase and kept unemployed: *Ibid.* But the purchaser cannot recover interest on his purchase-money for a period beyond that fixed for completion, if time is of the essence of the contract, because in such a case the purchaser can rescind on the date fixed for completion: *Metcalfe v. Fowler*, 6 M. & W. 830. In *Hanslip v. Padwick*, 5 Exch. 615, no interest was allowed on the purchase-money

borrowed by the purchaser. It does not appear when the money was borrowed, but it seems as if the Court considered that the contract was that a good title should be shown on the 11th October, and the purchase-money paid on the 29th November, that time was of the essence of the contract, and that, if the purchaser raised the money before the 11th October, it was only his own imprudence that caused the loss, as he should not have begun to act before he had ascertained whether the vendor could or could not complete his contract.

(b) The expenses of preparing, stamping, and entering into Agreement. the agreement: *Hanslip v. Padwick*, 5 Exch. 615.

(c) Of verifying the abstract: *Hodges v. Lord Litchfield*, 1 Abstract. Bing. N. C. 492, 499.

(d) Of searching for judgments: *Ibid.* Searches.

(e) Of investigating and endeavouring to clear up the title: Title. *Walker v. Moore*, 10 B. & C. 416.

(f) Of making journeys for that purpose: *Hodges v. Lord Journeys. Litchfield*, 1 Bing. N. C. 492.

(g) Of preparing the conveyance: *Ibid.* But if the purchaser, Conveyance. at the time of preparing the conveyance, knew or had notice of the incumbrances, or other defects on account of which he afterwards rescinds the contract, he cannot recover the cost of preparing the conveyance: see Sug. 362. And if the purchaser prepares his conveyance before the title-deeds are produced, he cannot recover this expense if he afterwards rescinds because of the non-production of the title-deeds (*Jarmain v. Egelstone*, 5 Car. & P. 172), although the conveyance was prepared in reliance on a note written in the margin of the abstract by the vendor's solicitor, stating that if it should be required they would apply to the solicitor for the original seller, in whose custody the title-deeds were: *Ibid.*

The purchaser need not show that he has paid, but merely Payment by purchaser. that he is liable for such expenses: *Richardson v. Chason*, 10 Q. B. 756.

But such damages do not include:—

(a) The expenses incurred by the purchaser previously to Previous expenses. entering into the contract: *Hodges v. Lord Litchfield*, 1 Bing. N. C. 492, 498.

- Survey.** (b) The expense of a survey made by him before examining the title: *Hodges v. Lord Litchfield*, 1 Bing. N. C. 492, 498.
- Conveyance.** (c) The expense of a conveyance drawn in anticipation: *Ibid.*
- Raising money.** (d) The expense of raising the purchase-money: *Hanslip v. Padwick*, 5 Exch. 615.
- (e) Loss through selling out stock: *Flureau v. Thornhill*, 2 W. Bl. 1078.
- Forming company.** (f) The expense of forming and registering a company for the purpose of carrying on certain works on the land: *Hanslip v. Padwick*, 5 Exch. 615.
- Improvements.** (g) In the case of a lessee with option of purchase, the expenses of improving the land before exercising the option, or examining the title: *Worthington v. Warrington*, 8 C. B. 134. Or of repairing a house: *Bratt v. Ellis*, Sug. App. No. 5, p. 812.
- Conveyance.** (h) The expense of preparing a conveyance after the discovery of a defect in the title: *Pounsett v. Fuller*, 17 C. B. 660.
- Negotiations.** (i) Expenses incurred in further negotiations: *Sikes v. Wild*, 32 L. J. Q. B. 375.
- Sub-sale.** (j) The costs of an abortive sub-sale: *Walker v. Moore*, 10 B. & C. 416.
- Costs of action.** (k) The costs incurred by the purchaser in defending an action for specific performance brought by the vendor and dismissed without costs: *Gray v. Fowler*, L. R. 8 Exch. 249.
- (l) The difference between the party and party costs, and the solicitor and client costs incurred by the purchaser in an action for specific performance brought by the vendor and dismissed with costs: *Hodges v. Lord Litchfield*, 1 Bing. N. C. 492, 500.
- Or (m) the costs of an action for specific performance brought by the purchaser and dismissed without costs on the ground of a defect in the vendor's title known to the purchaser before he brought his action: *Malden v. Fyson*, 11 Q. B. 292.

Damages in case of Vendor's Fraud or wilful refusal to complete.

- Fraud.** If the vendor has acted fraudulently, the purchaser may, in addition to the expenses actually incurred by him, recover damages for the loss of his bargain. Even the completion of the purchase will not, in such a case, disentitle him to

this relief. As to what constitutes fraud, see Chapter IX., pp. 86, 87.

If the vendor wilfully refuses to complete, the purchaser may, ^{Wilful refusal.} instead of suing him for specific performance, bring an action for damages, and in such action will recover the expenses he has incurred, and also damages for the loss of his bargain: *Engell v. Fitch*, L. R. 3 Q. B. 314; 4 Q. B. 659; *Godwin v. Francis*, L. R. 5 C. P. 295. Or the purchaser may sue for specific performance, together with damages for the loss of possession, from the date fixed for completion or giving of possession: *Jaques v. Millar*, 6 Ch. D. 153.

The judgment of Lord Chelmsford in *Bain v. Fothergill*, L. R. 7 H. L. 158, at p. 207, throws doubt upon the rule that the vendor's wilful default will entitle the purchaser to damages for the loss of his bargain, and lays it down that it is only in an action of deceit that such damages can be obtained. This was, however, only *obiter dictum*; and the decisions of *Engell v. Fitch* and *Jaques v. Millar* are opposed to it.

The measure of damages for a breach of contract was given in *Godwin v. Francis*, L. R. 5 C. P. 295, as "damages which ^{Measure of damages.} naturally flow from the breach of the contract." A more elaborate definition was attempted in *Hadley v. Baxendale*, 9 Exch. 341, at p. 354: "Such damages as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." This definition is, however, open to the objection that parties, when contracting, do not usually contemplate a breach (see per Fry, J., in *Jaques v. Millar*, 6 Ch. D. 153, at p. 158), and that it is not fair that the amount of damages should depend in any way on the mental capacity of the parties contracting. The "contemplation" mentioned was probably intended to refer not to a breach or to damages for a breach, but to the consequences of the contract, if performed, and the acts to be done by the parties in reliance on the contract.

Primâ facie, the measure of damages for the loss of the bargain is the difference between the contract price and the market

price at the time of the breach of the contract, *i. e.*, at the time fixed for completion.

In the case of a breach of contract to grant a lease, the measure of the damages for the loss of the bargain would seem to be the market value of the lease: *Spedding v. Nevell*, L. R. 4 C. P. 212.

Price on
resale.

In the absence of other evidence, the price at which the purchaser bargains to re-sell is taken to be the market price at the time fixed for completion, or, as it is sometimes put, the time of the breach of the contract: *Engell v. Fitch*, L. R. 3 Q. B. 314; 4 Q. B. 659.

In the absence of this and other evidence, the price at which the vendor afterwards sells the property is taken to be the market price at the time of the breach: *Godwin v. Francis*, L. R. 5 C. P. 295.

Business.

In the case of property required by the purchaser for carrying on his business, the Court will, in the case of the vendor's wilful refusal to complete, not only decree specific performance, but give damages to the purchaser for the loss he has incurred through not being able to carry on his business on the property since the day fixed for possession. Thus, in *Jaques v. Millar*, 6 Ch. D. 153, the Court decreed specific performance of an agreement to grant a lease, and awarded 250*l.* in respect of loss of profits which the plaintiff might have made in his business if the defendant had not wilfully refused to grant him a lease.

Cost of resale.

From *Spedding v. Nevell*, L. R. 4 C. P. 212, it would seem that the expenses incurred by a purchaser in connection with a sub-sale are not recoverable as damages against the vendor, unless it can be taken to have been in the contemplation of the parties at the time of the agreement that a resale should take place (*i. e.*, take place before the completion of the original purchase). In that case a lessee had agreed with the lessor's brother, acting (but without authority) as the lessor's agent, for a renewal of the lease; it was held that the lessee was entitled to recover against the lessor's brother the value of the new lease, but not the damages which she had had to pay to an assignee of her interest in the new lease, or the costs which she had paid and incurred in an action for damages by such assignee.

Loss on live
stock bought
by purchaser

In *Godwin v. Francis*, L. R. 5 C. P. 295, the purchaser was

not allowed to recover the loss incurred by him on the re-sale of horses, &c., which he had, before taking possession or investigating the title, bought, in order to stock the land with.

The measure of damages in an action against an agent who Agent. contracted without authority is the same as in an action against the principal for refusing to carry out the agreement: *Spedding v. Nevell*, L. R. 4 C. P. 212; see also *Godwin v. Francis*, L. R. 5 C. P. 295.

Procedure.

Originally a purchaser who wished to recover damages had to Procedure. bring an action at common law, in which, instead of rescinding, he affirmed the contract, and claimed damages for the vendor's breach thereof. The courts of equity either had no jurisdiction to award damages, or refused to exercise it. See *Guillim v. Stone*, 14 Ves. 128, and *Sainsbury v. Jones*, 5 My. & Cr. 1.

Lord Cairns' Act (21 & 22 Vict. c. 27), which empowered the Lord Cairns' Act. Court of Chancery in its discretion to award damages, either in addition to, or in substitution for, specific performance, in all cases where the Court had jurisdiction to decree specific performance, applied only to cases where the person asking for damages claimed, and was entitled to, specific performance, and did not enable the Court of Chancery to award damages in an action of rescission, or where the Court had no jurisdiction to decree specific performance. The jurisdiction which Lord Cairns' Act conferred still subsists, notwithstanding the repeal of that Act effected by the Act of 46 & 47 Vict. c. 49. See sect. 5 of the latter Act, and *Sayers v. Collyer*, 28 Ch. Div. 103.

The effect of the Judicature Act, 1873, s. 24 (7), is to give the Judicature Act, 1873, s. 24 (7). Chancery Division the same jurisdiction to award damages as was exercised by the courts of common law, but not any wider jurisdiction: *Lavery v. Purssell*, 57 L. J. Ch. 570. Where a court of common law would have awarded damages for loss of bargain, as in the case of the vendor wilfully refusing to complete, the Chancery Division will grant the same relief: *Jaques v. Millar*, 6 Ch. D. 153 (where the purchaser got a decree for specific performance and also damages for the period during

which the vendor had kept the purchaser's business at a standstill by refusing to complete).

Vendor and
purchaser
summons.

The purchaser may also recover damages, but not damages for the loss of his bargain, on a summons under the Vendor and Purchaser Act, 1874 (*Re Hargreaves and Thompson*, 32 Ch. Div. 454), even though the summons has been taken out by the vendor: *Higgins v. Percival*, 59 L. T. N. S. 213. And the Court will declare that the purchaser is entitled to a lien for such damages on the vendor's interest in the property: *Ibid.* Where the ground for relief is the vendor's misrepresentation, and not a mere defect in his title, it has been held that such a case is within the exception in sect. 9 of the Vendor and Purchaser Act, 1874, and the Court has refused to order the payment by the vendor of damages (*i. e.*, the purchaser's actual expenses) and return of the deposit: *Re Dacis and Carey*, 58 L. J. Ch. 143. But this decision is open to doubt, since the payment of damages and return of the deposit was not dependent on the decision of a "question affecting the existence or validity of the contract," as these words refer to the existence of the contract before the litigation is commenced, and the validity of the contract in its inception (see p. 317, below), not to the right of the purchaser to rescind an existent contract which is valid until rescinded.

Fraud must
be alleged.

In order to obtain damages for the vendor's fraud the purchaser must allege fraud in the pleadings: *Redgrave v. Hurd*, 20 Ch. Div. at p. 12. This is a survival of the old rule, that the vendor's fraud would entitle the purchaser to recover damages for the loss of his bargain only in an action of deceit. See remarks in *Sikes v. Wild*, 1 B. & S. 594, approved by Lord Chelmsford in *Bain v. Fothergill*, L. R. 7 H. L. at p. 206.

Inquiry.

When damages are awarded, either an inquiry in chambers is directed as to the amount (*Seton*, p. 1285), or damages are assessed by the judge at the trial of the action: *Jaques v. Millar*, 6 Ch. D. 153.

CHAPTER XVII.

COMPENSATION.

THE Court will, at the desire of the vendor, decree partial performance with compensation if the misdescription was non-essential (and if compensation can be fairly assessed), although the purchaser would prefer to abandon the contract. Compensation at vendor's desire.

"It is much too late to contend that every variation from the description will enable a man to resist the performance. The principle is, that if he gets substantially that for which he bargains, he must take a compensation for a deficiency in value": per Grant, M. R., in *Dyer v. Hargrave*, 10 Ves. at p. 507.

The words "if compensation can be fairly assessed" are perhaps superfluous, since the impossibility of assessing compensation would, of itself, prove that the misdescription is an "essential" one. But the words are often used by the Court. Thus, in *Magenis v. Fallon*, 2 Moll. at p. 588, per Hart, L. C., "If substantially the purchaser can have the thing contracted for, a slight variation in the qualifications of it will not disable the vendor from having a decree for specific performance when compensation can be made pecuniarily for the difference." See, as to the possibility of assessing compensation, pp. 139 to 154. If it can be fairly assessed.

There are two cases in which it seems to have been thought that the purchaser might be compelled to take an indemnity for a non-essential defect: *Wood v. Bernal*, 19 Ves. 220, and *Halsey v. Grant*, 13 Ves. 73. See, however, p. 157, below, as to an indemnity being forced on a purchaser. Indemnity.

The Court will, at the desire of the purchaser, decree partial performance with compensation, although the misdescription was one which would usually be regarded as essential, and even though the vendor would prefer to abandon the contract; Compensation at purchaser's desire.

provided that the misdescription was contained in the written contract, and that compensation can be assessed. If the misdescription was not contained in the written contract the purchaser's only remedy is rescission. See p. 161. If the misdescription was contained in the written contract, but compensation cannot be assessed, the purchaser may rescind [or may, if he prefer it, accept an indemnity : but see p. 155].

The principle enunciated in the above rule is thus laid down by Lord Eldon in *Mortlock v. Buller*, 10 Ves. 291, at p. 315: "If a man having partial interests in an estate chooses to enter into a contract, representing it, and agreeing to sell it, as his own, it is not competent to him afterwards to say, though he has valuable interests he has not the entirety, and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction (*i.e.*, specific performance), the person contracting under those circumstances is bound by the assertion in his contract, and if the vendee chooses to take as much as he can have, he has a right to that and to an abatement; and the Court will not hear the objection by the vendor that the purchaser cannot have the whole."

Owner of
moiety.

If the vendor is entitled only to an undivided moiety of the property, the entirety of which he contracts to sell, the purchaser may compel him to convey his moiety on payment of half the purchase-money : *Hooper v. Smart*, 18 Eq. 683.

Agreement
for lease.

The same principle is followed in the case of an agreement to grant a lease : see *Leslie v. Crommelin*, Ir. R. 2 Eq. 134. "If the landlord, from the limited extent of his estate or power, is unable to give in point of duration a lease for the whole interest which he agreed to give, then if the intended lessee is willing to take—for it cannot be forced upon him—the interest which the landlord can give, the latter must grant a lease to the full extent which his estate or power authorizes, and compensation will be made by this Court to the lessee for any loss that he may have sustained by reason of the agreement not being carried out to its full extent." In *Burrow v. Scammell*, 19 Ch. D. 175, a contract to grant a lease of a house by a person who was entitled only to an undivided moiety, was enforced to the extent of that moiety, with an abatement of the rent.

The rule applies also where the vendor has given an under- Undertaking.
taking which he is unable to perform. In *Peacock v. Penson*, 11
Beav. 355, upon the sale of leaseholds, the vendor undertook to
make a road, but was unable to carry out his undertaking with-
out causing a forfeiture of the lease; he was compelled to convey,
with an abatement of the purchase-money.

When two persons agree to sell property as tenants in com- Joint vendors.
mon, and it turns out that one of them has no title to his share,
the other of them will be compelled, at the instance of the pur-
chaser, to convey his share, with an abatement of the purchase-
money, in the proportion which the share with the defective title
bears to the share conveyed: *Horrocks v. Rigby*, 9 Ch. D. 180.

The purchaser has the same equity against a third person Third
persons.
purchasing from his vendor with notice of the first purchaser's
contract. Thus, in *Barnes v. Wood*, 8 Eq. 424, B. agreed to
purchase from S. the fee simple in certain land. It turned out
that S. had only an estate *pur autre vie*, with remainder to his
wife, and the wife refused to convey her interest. Afterwards,
knowing of B.'s contract, W. purchased from S., and took a
conveyance from S. and his wife. It was held that W. was
bound to convey to B. S.'s estate *pur autre vie*, the purchase-
money to be paid by B. being abated to the extent of the value
of the estate of S.'s wife in remainder.

If the purchaser knows the facts beforehand, and the vendor Purchaser's
knowledge.
has not misled him in any way, the vendor will not be com-
pelled to partial performance with an abatement of the purchase-
money. See Chapter VI. p. 54; and Chapter XXVI. p. 207.

Thus, in *Castle v. Wilkinson*, 5 Ch. 534, A., and B., his wife,
agreed by writing, not under seal or acknowledged, to sell B.'s
land, described as, "All that the moiety of A., and B., his
wife, in right of B., of and in, &c."; and B. afterwards refused
to convey. The purchaser was held not entitled to a conveyance
by A. of all his interest, with an abatement of the purchase-
money, because the purchaser knew that he was contracting to
purchase the wife's property, and could only get what she was
willing to convey. If in this case A. had agreed to sell the fee
simple, and had not informed the purchaser that the property
was his wife's, the Court would have decreed partial performance

(i. e., conveyance of A.'s estate for the joint lives of himself and his wife, and his estate by the curtesy) with compensation, unless it was found impossible to assess the amount of compensation (as to which see below, p. 139).

Notice that the vendor has not the fee may be excluded by an express undertaking by the vendor to procure the concurrence of all necessary parties. Thus, in *Barker v. Cox*, 4 Ch. D. 464, where the vendor had stipulated that the property was "settled to such uses as he and his wife should jointly appoint, and that the vendor would procure a proper assurance to be executed by all proper parties"; and where, subject to such appointment, the wife was entitled for life, remainder to the vendor, the purchaser was, on the refusal of the wife to convey her life interest, held entitled to partial performance, with compensation.

Trustees.

The rule laid down at p. 131 is subject also to the general rule that if the vendors are trustees who have no power to sell, or who conduct the sale in such a manner that the sale, if carried out, would be a breach of trust, the Court will not, even at the instance of the purchaser, compel the trustees to complete. In *Ord v. Noel*, 5 Madd. 438, at p. 440, Leach, V.-C., says: "If trustees or those who act by their authority fail in reasonable diligence; if they contract under circumstances of haste and improvidence; if they make the sale with a view to advance the particular purposes of one party interested in the execution of the trust at the expense of another party, a court of equity will not enforce the specific performance of the contract." In *Mortlock v. Buller*, 10 Ves. 292, a tenant for life selling as agent for the trustees fixed the amount of the purchase-money without being informed by the auctioneer of the result of a re-valuation of the property, which showed that the property was worth 5,000*l.* more than was at first supposed. Upon hearing of the re-valuation, the trustees refused to adopt the contract of the tenant for life, and the Court held that they could not be compelled to complete, as the sale would, under the circumstances, be a breach of trust.

Where trustees have, through want of reasonable diligence, misdescribed the property, or neglected to guard against defects of title by properly-drawn conditions, the Court will not grant compensation to the purchaser, even though there is a condition

for compensation. See *White v. Cuddon*, 8 Cl. & F. 766, at p. 797. Of that case Lord Campbell says: "The consideration that they sold as trustees is enough to show that specific performance, making compensation, ought not to have been decreed. It is an implied condition that trustees to sell will use all reasonable diligence to obtain the best price." The proposition stated in *Dart*, p. 158, that "where the vendors are trustees they are not justified in allowing compensation for their own errors" is rather too wide. If the error of the trustees was not caused by a want of reasonable diligence, the Court will allow compensation to the purchaser or enforce the trustee's contract to give compensation. In *Crompton v. Lord Melbourne*, 5 Sim. 353, a contract by trustees to give compensation was enforced by the Court. In *Hill v. Buckley*, 17 Ves. 394, partial performance with compensation was enforced against trustees whose agent had misstated the acreage of the property. In that case it is even doubtful whether the agent had acted with reasonable diligence, and there was no condition for compensation.

In *Dunn v. Flood*, 28 Ch. Div. 586, a condition allowing compensation was said to be a usual condition. See further, Chapter XXXVII., p. 365.

Where a partial owner contracts to sell on behalf of the trustees, without informing the purchaser that he is contracting merely as agent, it would seem that, on the refusal of the trustees to carry out the sale, the purchaser cannot compel the partial owner to convey his interest, making an abatement of the purchase-money. In *Mortlock v. Buller*, 10 Ves. 292, the partial owner, who was equitable tenant for life, contracted to sell not as owner, but as agent for the trustees, who either had not given him authority to act, or would, under the circumstances of the case, if the sale were completed, be committing a breach of trust, so that the Court could not enforce the contract against them. The Court also refused to enforce it so far as concerned the partial interest, with abatement for the deficiency, on the ground that the partial owner intended not to sell as owner, but as agent for the trustees.

The vendor will not be ordered to convey his partial interest where this order might be prejudicial to the interests of a third

Agent who is partial owner.

Prejudicial to third persons.

person interested in the property, and towards whom the vendor stands in a fiduciary or quasi-fiduciary relation.

Thus, in *Thomas v. Dering*, 1 Keen, 729, where the vendor had merely a life estate under a settlement, without impeachment of waste, with remainder to his sons in tail male, the Court refused to compel him to convey this partial interest, as the conveyance might be injurious to the remaindermen by putting it into the power of a stranger to commit waste.

So, where one of three trustees, who was also beneficially entitled to one-fifth of the property, contracted to sell the entirety, expecting the other trustees would join, on their refusal, he was not compelled to convey his own one-fifth, on the ground that it was trust property, and it might have injured the other *cestuis que trust* by causing a severance: *Naylor v. Goodall*, 47 L. J. Ch. 53.

Fraud on
power.

The Court will not compel partial performance of a contract to lease, which, if specifically performed, would have been a fraud on a power (at all events, where the lessee is aware of the facts of the case).

In *Harnett v. Yeilding*, 2 Sch. & L. 549, the lessor, who was, as the lessee knew, tenant for life, with a limited power of leasing, had contracted to grant a lease for twenty-one years, and a further lease for twenty-one years at any time during his life. The Court refused to decree partial performance, *i.e.*, the granting of a lease for forty-two years if the vendor should so long live, on the ground that the original contract, if carried out in its integrity, would have been a fraud on the power.

Hardship.

The Court sometimes refuses to decree partial performance with abatement on the ground of hardship to the vendor. The ground of the refusal is, in the cases themselves, put on the ground of "mistake," meaning probably what is usually called "common mistake" (see Chapter VIII., p. 78), as in *Earl of Durham v. Legard*, 34 Beav. 611; or on the ground of the extent of the error or deficiency, as in *Wheatley v. Slade*, 4 Sim. 126. In *Earl of Durham v. Legard*, the vendor had described his property as containing 21,750 acres, when it only contained about half that quantity; the rental was accurately stated, and the vendor fixed the price by the rental; the purchaser was not

allowed to insist on partial performance with an abatement. In *Wheatley v. Slade*, which was decided on a motion to dissolve an *ex parte* injunction, Shadwell, V.-C., held that the defendants, who were entitled to nine-sixteenths of an estate, and had, through mistake, contracted to sell the whole, could not be compelled to convey their interest with an abatement, especially as there was a lien on their interest which would exhaust nearly all the purchase-money. The Vice-Chancellor thought that the ordinary rule would not apply "where a large portion of the estate cannot be conveyed." In *Maw v. Topham*, 19 Beav. 576, Romilly, M. R., without giving any reasons, refused to enforce specific performance with an abatement, the vendor having only three undivided fourths of what she purported to sell.

More recent decisions, however, show that the magnitude of the deficiency is not a sufficient reason for deviating from the general rule that a purchaser is entitled to partial performance with abatement, if abatement can be fairly assessed. In *Hooper v. Smart*, 18 Eq. 683, the vendors, who were entitled only to an undivided moiety of the property, the entirety of which they had agreed to sell, were compelled to convey their moiety, the purchase-money being abated to one-half. In that case the vendors could not complain of hardship, because they would probably not have obtained so good a price if they had been selling their moiety as an "undivided moiety." In *Horrocks v. Rigby*, 9 Ch. D. 180, R. and L. contracted to sell for 200*l.* a leasehold public-house, which they claimed to be entitled to as tenants in common subject to a mortgage for 400*l.* On examining the title, the purchaser discovered that L. had no interest, and that R. was entitled to a moiety subject to a mortgage, on which 240*l.* remained due. Partial performance with abatement was decreed against R. at the instance of the purchaser, although the abatement swallowed up the whole of the purchase-money payable to R. There was no hardship here, because, though R. received no purchase-money, he was practically relieved from the mortgage debt, and from his liability under the covenants in the lease.

In *Great Northern Railway and Sanderson*, 25 Ch. D. 788, land was sold "free from incumbrances" for 868*l.* It was after-

wards discovered that the land was subject to a perpetual rent-charge of 63*l*. On the application of the purchaser that the vendor should be ordered under the Conveyancing Act, 1881, sect. 5, to pay money into Court to discharge the incumbrance, Pearson, J., refused to make the order, partly on the ground that the sum required to discharge the incumbrance would be nearly three times the amount of the purchase-money, and it would be inflicting a hardship on them to enforce the contract. In that case the vendors were entitled to rescind under a condition for rescission.

What is
hardship.

There is not sufficient authority to make it possible to lay down with any certainty what constitutes hardship in the estimation of the Court. Perhaps it is advisable that some elasticity should be retained in such matters, and this may be the reason why the Court is in the habit of reminding itself that the relief by way of specific performance is in the discretion of the Court. As has been already said, the extent of the error does not necessarily involve hardship, nor does the fact that a mistake has been committed. It may be suggested that the case of a deficiency in acreage is more likely to be one of hardship than is the case of a defect in title to part of the property, because in the first the vendor has to convey the whole estate with an abatement of purchase-money, even though when contracting he fixed the purchase-money by reference to the rental or to the price *he* paid when he purchased, but in the second he conveys only that part of the property to which he has a good title, getting a fair price for it and retaining the other part, his title to which is defective. Another distinction is suggested, viz., that the Court is more likely to relieve the vendor if his mistake consists of an inadvertent misdescription, than where his mistake is as to the size, quality, &c. of the land, which is the subject-matter of the contract. Thus, given a piece of land containing 100 acres; now, if the vendor, knowing that the land contains 100 acres, yet by inadvertence, or still more by his agent's blunder, describes it as containing 200 acres, it would be a hardship if the purchase-money were reduced to one-half, because the vendor probably accepted the purchase-money offered, or, if selling by auction, fixed the reserved price, by

reference to the acreage known to him. But if the vendor imagining the land to be 200 acres in extent, so describes it, there would seem to be no hardship in reducing the purchase-money to one-half upon discovering that the land itself contained only one-half, unless it could be shown that the vendor fixed the price otherwise than by reference to the acreage. This distinction appears to be supported by what took place in *McKenzie v. Hesketh*, 7 Ch. D. 675. There the plaintiff's tender for a lease of a farm of 249 acres at 500*l.* was accepted by the defendant's agent, who thought that the acreage in the plaintiff's tender was the same as that in another person's tender, viz., 235 acres, the acreage of the farm being really only 214. The defendant was compelled to grant a lease of the 214 acres, the rent being reduced in the proportion not of 249 to 214, but of 235 to 214. It is difficult to see why the plaintiff accepted the judge's suggestion (see p. 679 of the Report) that 235 acres should be taken as the basis of the rent of 500*l.*, instead of 249, the acreage actually mentioned in the tender, unless it was thought that the mistake of the defendant's agent as to the contents of the plaintiff's tender was a mistake of such a nature as to induce the Court to refuse partial performance with abatement, while the mistake of the defendant's agent as to the actual acreage of the farm was a different sort of mistake, and one which would not prevent the Court from granting partial performance with abatement. It may also be remarked that the Court is more likely to treat a vendor with indulgence if the mistake made is the mistake of the agent alone: per Fry, J., in *McKenzie v. Hesketh*, 7 Ch. D. 675, at p. 680.

The words "provided that compensation can be fairly assessed" are inserted in the above rule with some doubt, because the Courts have assessed compensation in some cases where it would seem that no pecuniary compensation could be fairly given. Thus, the absence of any title to work the minerals has been the subject of compensation (see below, p. 151.) And in *Re Chifferiel*, 40 Ch. D. 45, compensation was assessed for the difference in value between an estate with the road "made up," and with the road in the incomplete state in which it was at the time of the sale. In *Peacock v. Penson*,

If compensation can be fairly assessed.

11 Beav. 355, also a case of compensation for roads, the decree contains no order as to compensation: Reg. Lib. 1848, B. 257.

But upon the whole it seems the better opinion that where compensation cannot fairly be assessed the Court will not grant compensation. Lord Langdale, in *Thomas v. Dering*, 1 Keen, 729, says, p. 746: "It is impossible not to see that the *cy près* execution of the contract which is given in these cases is in fact the execution of a new contract which the parties did not enter into, in which there is no mutuality, and in which there are no adequate means of ascertaining the just price. It is more easy to compute a just compensation when it is to be given for the defect in the quantity or the quality of the land sold, than when it is to be given for the deficiency of the vendor's interest." Lord Cottenham, in *White v. Cuddon*, 8 Cl. & F. 766, says: "It has been in more cases than one considered as a fatal objection to a decree for compensation when you cannot ascertain what the compensation should be." In *Graham v. Oliver*, 3 Beav. 124, at p. 128, Lord Langdale, speaking of the difficulties in cases of partial performance with abatement, considered that performance should be enforced with compensation where it could be done "without any great preponderance of inconvenience."

In *Cox v. Corenton*, 31 Beav. 378 (see pp. 391, 392), Romilly, M. R., refused to decree partial performance with compensation on the ground "that the difference between the thing described and the thing sold is not susceptible of being accurately measured in value, so as to be the subject of compensation."

The question, in what cases compensation can be assessed is discussed in pages 141 to 154, below, on the method of assessing compensation.

Indemnity.

If compensation cannot be assessed, the purchaser may, perhaps, be protected by an indemnity. See p. 155.

Partial performance without compensation.

If the purchaser is willing to waive the objection to the defect, he may compel the vendor to convey such interest as he has, where the Court would refuse to decree compensation or an indemnity. See *Price v. North*, 2 Y. & C. Ex. 620; *Western v. Russell*, 3 Ves. & B. 187, at p. 192; and *Wood v. Griffith*, 1 Wilson, Ch. 34, at p. 44.

CHAPTER XVIII.

METHOD OF ASSESSING COMPENSATION.

It must be observed that the proviso in rules 2 and 3 (see pp. 97 and 131) is not "if compensation can be assessed," but "if compensation can be fairly assessed." It is, of course, always possible to assess compensation, just as it is always possible to measure damages for injuries to the body, the feelings, or the reputation. But in assessing damages for a tort it is not considered necessary nicely to weigh the damage in the interest of the aggressor, justice being satisfied if the damages given to the person injured are sufficient, and not caring if they may happen to be too much. In computing compensation for a misdescription, however, the rough calculations of a jury are unsuitable: the interests of the vendor have to be considered as well as those of the purchaser, and if the compensation does not admit of a pecuniary valuation which shall be as fair to the vendor as it is to the purchaser, the Court will probably refuse to make a rough estimate or an educated guess.

The mere difficulty of assessment, where a fair assessment is possible, will not, however, deter the Court. In some cases, where the possibility of assessment was doubtful, the Court has directed an inquiry whether compensation can be assessed.

In *Barnes v. Wood*, 8 Eq. 424; Reg. Lib. 1868, A. 2078, a Inquiry. reference to chambers was directed to ascertain the amount of compensation. In *Hill v. Buckley*, 17 Ves. 394; Reg. Lib. 1810, A. 1333, the order was that the abatement should be settled by the judge. In *Nelthorpe v. Holgate*, Reg. Lib. 1843, B. 952, it was referred to the master to inquire and state to the Court "what will be a fair and proper compensation to make to the plaintiff out of the purchase-money in respect of such life estate." In *English v. Murray*, 49 L. T. N. S. p. 39,

the Court directed an inquiry "whether any and what abatement ought to be made" from the purchase-money.

Purchaser's
conduct.

The conduct of the purchaser, or the calculation made by him in fixing the price which he offered, sometimes enables the Court to assess compensation in a case which would not otherwise admit of computation.

In *Baker v. Bent*, 1 Russ. & M. 224, which was an action to rescind the sale of a contingent reversion because of inadequacy of price, the Court, after stating that as a general rule it was impossible to assess the value of a contingent reversion, fixed the value in that case as half the value which such reversion would have borne if it had been absolute instead of contingent; arriving at this decision on the ground that the purchaser himself had offered one sum under the impression that the reversion was absolute, and on hearing of the contingency had reduced his offer to half that sum.

Again, in *Powell v. Elliot*, 10 Ch. 424, where the vendor had overstated the annual profits of a colliery which he was selling, the purchase-money itself was taken as the basis for calculating the amount of compensation, viz., the capitalized value of the deficiency in the profits, because the purchaser had, by offering such sum, shown how he himself capitalized the annual profits as stated by the vendors. Some of the cases cited below further illustrate the proposition, that if the Court can find a way of giving compensation to the purchaser without inflicting disproportionate injury on the vendor it will do so, however difficult the task may be; some of the cases even going so far as to suggest that the Court will not always measure the proportion of injury to the vendor or consider the probability of the abatement being unfair to him.

What defects
admit of
compensation.

It is impossible to lay down any general rule as to what will induce the Court to say that compensation cannot fairly be assessed. Dart (p. 1191) says: "A purchaser cannot claim conveyance of an interest to which a vendor shows a doubtful or defective title with an abatement in respect of the imperfection in title, except perhaps where the defect is of a temporary character, or is otherwise a fit subject for compensation." This statement of the law, however, seems not only vague and

uncertain, but inaccurate. It is clear from the cases that not only temporary defects in title admit of compensation, but also defects which are not temporary. Thus, the fact that the vendor has only an estate *pur autre vie*, instead of the fee, has been allowed to be the subject of compensation: *Barnes v. Wood*, 8 Eq. 424. As to the case of doubtful title, it would seem that the diminution in value of an estate arising from the possibility of the existence of a defect whose existence is not proved does not admit of calculation. In such a case, if the purchaser insisted on completion, the Court would probably decide either that the defect existed or that it did not; if the purchaser, however, preferred to rescind he could do so under the general principle that a doubtful title cannot be forced on a purchaser. See Chapter XXVI. p. 191.

Thus, in *Morris v. Preston*, 7 Ves. 547, the purchaser desired partial performance with abatement for a lease which he said affected the property. The lease was an agreement for a lease of a farm to a clergyman for the purpose of occupation, which appeared, though this was doubtful on the cases, to be void under 21 Hen. VIII. c. 18. The judge, though apparently doubtful whether the lease was good or not, decided that it was bad, and that the purchaser was not entitled to compensation. If the purchaser had preferred to rescind, the question whether the lease was good or not would probably not have been decided. Where there is a mere technical defect of title, it would seem that a purchaser ought not to be able to enforce partial performance with abatement, because if he objects to the defective title the remedy is in his own hands; he can rescind the contract. If he is willing to accept the title notwithstanding the technical defect, he will in all probability meet with no difficulty in selling the property again, especially if he employ suitable conditions of sale. Whether this is so or not, the difficulty of reselling caused by the defect in title would seem to be one of those things which do not admit of calculation. Thus, in the case of the sale of a house in a residential neighbourhood by a vendor who has no title to the minerals, but omits to mention the defect, the purchaser may, of course, rescind, because the defect is an essential defect of title; but if he desires to

Doubtful
title.

Technical
defect of title.

Minerals.

complete, it would be unfair to give him any compensation for the defect, since, the enjoyment of the property being unimpaired by the defect, the difference in value (if any) can only arise from the diminished saleableness of the house, which is too uncertain to admit of computation.

Duration of
life.

Any deficiency in the vendor's interest, which depends on the duration of a life, will be assessed by the Court by an actuarial computation. The chance that the duration of the life may be so different from the actuary's estimate as to give the purchaser both the estate and the compensation, does not make this method of assessment unfair; because the purchaser is equally exposed to the risk of the compensation being, in the event, too small, and the Court will "throw the chances together": per Lord Eldon in *Milligan v. Cooke*, 16 Ves. 1.

1. *Deficiency in Quantity.*

Quantity.

A deficiency in quantity is ordinarily compensated for by a proportionate abatement of the price, which may generally be ascertained by a simple rule of three sum. Suppose a deficiency of 7 acres out of 40. Then, as 40 acres is to 33 acres so is the agreed purchase-money to the purchase-money which the vendor is entitled to receive. See *Leslie v. Thompson*, 9 Ha. 268. In a contract to grant a lease, a deficiency in quantity is compensated for by a proportionate reduction of the rent (and also of the premium, if any). See *McKenzie v. Hesketh*, 7 Ch. D. 675.

The fact that the land varies in quality, and therefore in value, will not prevent the Court from estimating the amount of compensation. See *Leslie v. Thompson*, 9 Ha. 268, where, however, the conditions of sale provided for the assessment of compensation by arbitration. The value of the parcel of land in which the deficiency in acreage occurs would be the test of the amount of compensation. If instead of occurring in one parcel the deficiency is in the whole property, the acreage of the different parcels not being given, and the parcels varying in quality, it would seem that compensation should be assessed by spreading the deficiency over the whole of the parcels rateably.

Woodland.

Where woodland is described as of larger acreage than it really is, but the purchaser is correctly informed as to the value

of the wood itself, the proper compensation is an abatement of the purchase-money to the extent of the value of the missing acres as woodland less the value of the wood thereon; in other words "the abatement is to be only so much as soil covered with wood would be worth after deducting the value of the wood": *Hill v. Buckley*, 17 Ves. 394.

On the sale of land containing buildings, compensation ought Buildings.
not to be measured simply by the deficiency of acreage: per Lord Esher, M. R., in *Terry and White*, 32 Ch. Div. 14, at p. 25.

If the deficiency is not in the acreage, but in the amount of Undivided share.
the share to which the vendor is entitled, *e.g.*, if the vendor is entitled to one undivided half part instead of to the whole, the rule of three method is still applied. But it would seem that, if compensation is to be accurately assessed, the purchaser is entitled to some additional compensation in such cases on the ground that an undivided half is not exactly half as valuable as the entirety. The rule of three is fairly applied on a deficiency in acreage, for 20 acres of pasturage is, as a rule, just half as valuable as 40 acres of pasturage; but it does not follow that an undivided half share of 40 acres is half as valuable as the entirety of 40 acres, as there must, in the latter case, be some expenses incurred in partition before the purchaser becomes entitled absolutely to his 20 acres.

In *Hooper v. Smart*, 18 Eq. 683, where the vendor was entitled to an undivided moiety instead of the entirety, the purchase-money was simply reduced to one-half.

In *Jones v. Evans*, 17 L. J. Ch. 469, where the vendors agreed to sell two undivided sixths of certain leaseholds, being entitled only to two undivided sixths of two-thirds thereof, a third of the purchase-money was deducted. This appears from Reg. Lib. 1847, A. 2333, the sum deducted being 46*l.* : 13*s.* 4*d.* being one-third of the purchase-money of 140*l.*

The same principle has even been applied to an agreement to Agreement to lease.
lease. In *Burrow v. Scammell*, 19 Ch. D. 175, the lessor being entitled only to an undivided moiety of a house instead of the entirety, the rent was reduced to one-half. It is difficult to see what good a lease of an undivided moiety of a house would be to the lessee; but it appears that the lessee had been in pos-

session for three years, and expended a good deal of money on the house.

2. Duration of Leases.

Duration of
lease.

A deficiency in the duration of a term of years may be measured thus: the net profits of the land during the period between the termination of the actual term and the termination of the term mentioned in the particulars may be regarded as an annuity, and the present value of that deferred annuity will then be the measure of compensation for the deficiency in the term. See Clerke & Humphrey's "Sales of Land," p. 356.

Where land sold in January, 1842, was described as occupied by C. as a tenant from year to year, at a rent of 80*l.* per annum, payable on 1st May and 1st November, the fact being that C. was a lessee with a power of determining on the 25th March in any year at six months' notice, and had given due notice to determine the tenancy on the 25th March, 1842; the Court thought the proper amount of compensation would probably be one year's rent: *Martin v. Cotter*, 8 Ir. Eq. R. 147.

The difference in value between a legal term of thirty-one years and a legal term of twenty-one with an additional equitable term of ten years, was referred to the master to assess in *Hanbury v. Litchfield*, 2 My. & K. 629.

The difference between a term of twenty-one years absolute and a term of twenty-one years determinable on the vendor's death, admits of actuarial computation. See p. 148, below; *Dale v. Lister*, 16 Ves. 7.

Lease for
lives.

Where the land sold was subject to (undisclosed) leases for lives at a low rent, the Court directed compensation to be assessed: *Hughes v. Jones*, 3 D. F. & J. 307. The probable duration of the leases might be computed by an actuary. See below, p. 148.

3. Misstatement of Profits.

Profits.

If the rental or annual profits are overstated, the proper compensation will be a reduction of the purchase-money by the capitalized amount of the excess of rental or profits. The capitalization will be ascertained, not by a fixed number of years, but by the analogy of the purchase-money itself, which

the purchaser (if not the vendor) is supposed to have fixed with reference to the rental or profits as stated by the vendor.

On the sale of a colliery as a going concern, the net annual profits were stated by the vendors as 66,049*l.*, which exceeded the actual profits by 9,500*l.* Compensation for this misrepresentation was assessed thus: the purchase-money, 365,000*l.*, was taken as the basis of calculation and treated as the value ascertained by the bargain itself. After deducting from the purchase-money certain sums as the present value of the future auction value of the plant, the sum of 361,674*l.* remained as the capitalized value, according to the estimate of the vendors and purchasers themselves, of the annual profits as stated by the vendors, viz., 66,049*l.* We then have a simple rule of three sum. As 66,049*l.* is to 361,674*l.*, so is 9,500*l.* to the sum to be deducted as compensation: *Powell v. Elliot*, 10 Ch. 424.

The difference in value between a manor in which the fines are arbitrary and one in which they are certain, is impossible of assessment: *semble*, *White v. Cuddon*, 8 Cl. & F. 766. Fines
arbitrary.

4. Incumbrances.

The case of ordinary mortgages presents no difficulty. But in the case of rent-charges and other annual payments, which have been either understated or omitted altogether by the vendor, compensation very often cannot be assessed. The proper method of assessing compensation is, of course, to capitalize the value of the rent-charge, &c., or of the excess thereof above the amount stated in the particulars. But if the purchaser has simply paid so much per acre for the land, the Court cannot tell how many years' value he has given for the property. If, however, the purchaser has estimated the value of the property by capitalizing the rents or income derivable therefrom, he affords the Court a fair test of the value of the excess in the amount of rent-charges, &c. If he thinks the property worth twenty years' purchase, the Court may very fairly take twenty years as the basis of capitalization of the excess of the rent-charges, &c. understated by the vendor. Incum-
brances.

On a sale of tithes, it was found that there was an annual fee-farm rent, and also an annual payment for the benefit of the

poor, charged on the tithes. Compensation for these incumbrances was assessed at twenty-nine years' purchase, this being the number of years' purchase at which the purchaser had bought the tithes themselves: *Horniblow v. Shirley*, 13 Ves. 84.

In *Powell v. South Wales Ry. Co.*, 1 Jur. N. S. 773, both compensation and an indemnity by personal covenant were given. The method of assessing compensation for the undisclosed incumbrance, viz. a rent-charge of 20*l.* issuing out of 122 acres, of which only $3\frac{1}{2}$ acres were being sold, was to deduct from the purchase-money such an amount as should bear to the value of the rent-charge (which was considered by the Master worth 500*l.* or twenty-five years' purchase), the same proportion that the $3\frac{1}{2}$ acres bore to the whole estate of 122 acres: see below p. 156.

In *Bainbridge v. Kinnaird*, 32 Beav. 346, no compensation was ordered for an undisclosed charge of 15,000*l.* for portions, the land sold being only a part of a large estate (rent roll 20,000*l.* a year) charged with the said sum of 15,000*l.*

5. *Life Estates, Reversions, &c.*

Duration of
life.

Where the extent of the deficiency depends on the contingency of the duration of a life, the amount of compensation can usually be computed by an actuary.

Remainder.

If, instead of having the fee simple, the vendor turns out only to have an estate in remainder expectant on the termination of a life estate, the amount of compensation is the value of the life estate, to be assessed by an actuary. See *Nelthorpe v. Holgate*, 1 Coll. 203, 223; and *Barker v. Cox*, 4 Ch. D. 464.

The method apparently followed by the Court, viz. to deduct from the purchase-money the value of the life interest, does not, however, produce a perfectly accurate result. The life interest and the reversion by being sold together fetch a higher price. The proper amount of compensation, therefore, would seem to be to value separately the life estate and the reversion, and to deduct from the purchase-money a sum bearing the same proportion to the full purchase-money that the value of the life interest bears to the total values of the life interest and reversion, valued separately. See *Re Cooper and Allen*, 4 Ch. D. 802, at p. 807.

An actuarial valuation may also be made, where the vendor professing to sell the fee has only a life estate: *Mortlock v. Buller*, 10 Ves. 292, 316; or an estate *pur autre vie*: *Barnes v. Wood*, 8 Eq. 424.

In *Thomas v. Dering*, 1 Keen, 729, where the vendor had a life estate and also a remainder in fee expectant on his death without issue, the Court refused to decree partial performance with abatement, partly, perhaps, on the ground of the difficulty of computing compensation, but chiefly on the ground that specific performance would be prejudicial to the interests of third persons. See p. 136.

The case of the vendor being only entitled *jure mariti*, instead of being owner in fee, would also seem to admit of actuarial computation. See *Jones v. Evans*, 17 L. J. Ch. 469.

The possibility of the vendor's wife, who refuses to release her dower, surviving the vendor would seem to admit of actuarial computation. See *Re Hall's Estate*, 9 Eq. 179, a case under the Lands Clauses Act. But in *Wilson v. Williams*, 3 Jur. N. S. 810, an indemnity was given instead of an abatement being made. See p. 155.

On a sale of leaseholds which were usually renewed every seven years, the vendor guaranteed a term of twenty-one years certain, and it afterwards appeared that as to 24 acres, parcel of such leaseholds, he had only a life interest. It was referred to the Master to determine the difference in value between the absolute term of twenty-one years, and such an interest as might be disappointed by the cesser of the vendor's life: *Dale v. Lister*, cited 16 Ves. 7, 11.

On a contract to grant a lease of a fishery for three lives or thirty-one years, when it was discovered that the lessor, being merely tenant for life, had no power of leasing beyond his own life, the lessor was compelled, at the instance of the lessee, to grant a lease for his own life, and to give compensation for the difference in value between such lease and the lease he had agreed to grant: *Leslie v. Crommelin*, Ir. R. 2 Eq. 134.

On the sale of a reversion expectant on the death of A. without children, a misrepresentation of A.'s age may involve contingencies not admitting of actuarial or other computation. See p. 150. Death without children.

6. *Difference of Tenure.*

Tenure. The difference in value between freeholds and copyholds would probably not admit of compensation.

Renewable leaseholds. The difference in value between leaseholds where there is a custom to renew, and leaseholds which may or may not be renewed at the individual or arbitrary will of the lessor, who has, however, a *habit* of renewing at the same rent and the same fine, seems an incalculable quantity. But the Court, in *Painter v. Newby*, 11 Ha. 26, treated such leaseholds as non-renewable, disregarding the lessor's habit of renewal. In church leases the case would probably be different, as there is there more than a mere habit to renew, it being to the interest of the lessors, who are only life tenants, to renew: *Ibid.*, p. 30.

In *Painter v. Newby*, the property was described as "customary leasehold held of the lord of the manor of B., and renewable every twenty-one years on payment of the customary fine at an annual rent of 10s.," and it was afterwards discovered that there was no custom of renewing. The Court directed an inquiry as to the difference in value "between a leasehold interest renewable every twenty-one years on the payment of the customary fine (calculated on the same principle as the fine paid on the last renewal), and at the annual rent of 10s., and the value of the interest in the same property which the vendor is capable of conveying to the purchaser." The fact that there was a condition for compensation may, perhaps, have influenced the Court in deciding to decree compensation in that case.

7. *Contingencies not admitting of Actuarial Computation.*

Other contingencies. Contingencies other than that of duration of life (which admits of actuarial computation, see p. 148) will not be assessed by the Court.

Thus, where a reversion expectant on the death of A. (a man) without children, is being sold, and A.'s age is described as sixty-six, being really sixty-four years, the contingency of A. having children is materially altered, and the Court will not estimate the difference between the probability of a man aged sixty-four having children, and the probability of a man aged sixty-six having children. See *Sherwood v. Robins*, Moo. & Mal. 194. If A. had been a woman, or if the ages had been eighty-four

and eighty-six instead of sixty-four and sixty-six, the contingency of the birth of children would have been reduced to an impossibility, and the Court would, no doubt, have assessed the difference in value between the reversion as described and the reversion actually sold.

8. *Minerals.*

It is doubtful whether compensation can be fairly assessed for **Minerals.** the absence of title to the minerals. In *Smithson v. Powell*, 20 L. T. 105 (dictum), and *Re Bunbury's Estate*, 1 Ir. R. Eq. 458 (decision), compensation for this defect was considered not to admit of calculation. In *Seaman v. Vaudrey*, 16 Ves. 390, and *Ramsden v. Hirst*, 4 Jur. N. S. 200, compensation was assessed.

In *Seaman v. Vaudrey* (which was a case of salt works to which the vendor had no title, as they had been reserved out of the conveyance to the vendor's predecessor in title), it was the vendor who was suing for specific performance, and it does not appear from the report whether the vendor would have preferred to have the contract rescinded. *Ramsden v. Hirst*, 4 Jur. N. S. 200, was a case of a sale by the Court, and the fact that the purchase-money was in Court might, perhaps, have influenced the Court in decreeing compensation. The fact that there was a condition allowing compensation for errors probably made no difference. See the report in 6 W. R. 349, at p. 350.

In *Smithson v. Powell*, 20 L. T. 105, Lord St. Leonards said: "I am of opinion that the Court would not grant compensation for the right to take coal. It was said that the coal was not worth the digging for; but it might be worth three or four thousand pounds. How then was the Court to estimate its value? Can it be said that the purchaser ought to have two-thirds more than the whole purchase-money as a compensation for the loss of the right to take coal under the surface of his purchase?"

If it is doubtful on the authorities whether compensation for **Method of assessment.** minerals is capable of assessment, the proper method of assessment is more doubtful still. The method adopted by Kindersley, V.-C., in *Ramsden v. Hirst*, according to the report of that case in 4 Jur. N. S. 200, was to deduct from the purchase-money the value of the minerals, to be ascertained by an expert

appointed by the judge. The decree, however, does not bear out the report, it merely declares that the purchaser "is entitled to compensation out of his purchase-money in respect both of an outstanding right under the agreement of 22 Nov., 1823, to enter the land and sink shafts and work the mines, and also of the purchaser being precluded from working the coal (if any) under the said land himself": 1857, B. 1259. A subsequent order shows that 195*l.* was paid to the purchaser for compensation, the amount of the purchase-money being 2,241*l.*: see Reg. Lib. 1857, B. 1354.

Where, as in *Ramsden v. Hirst*, it is not known whether there are any minerals at all, the employment of an expert to ascertain their value seems to be about as judicial a proceeding as tossing a coin in the air. If the land sold is situated in an agricultural neighbourhood, the fairest method of assessment would be to estimate the value of the land as agricultural land, and then, if necessary, to reduce the purchase-money to such estimated value. If the property sold is a house in a residential neighbourhood, it seems impossible to say how much less the property is worth on account of the absence of title to the minerals, since, the enjoyment of the property being unimpaired by the defect, the difference in value could only arise from the diminished saleableness of the house, owing to what might be called a technical defect of title, and this is too uncertain to admit of computation.

9. *Timber.*

Timber.

On the sale of a timber estate, the description used was "sixty acres of fine oak timber trees, the average size of which approaches fifty feet." Counting as timber-trees those which contained at least ten cubic feet, the average size was thirty-four feet, six inches; counting in smaller trees, the average size was twenty-two feet. The Court held that there had been a misdescription, but that, as the particulars of sale did not give the number of trees, or the total quantity of timber, the Court could not assess compensation: *Lord Brooke v. Rounthwaite*, 5 Ha. 298.

10. *Other Matters.*

"In occupation of B."

Where land leased to and in the occupation of T., whom the purchaser did not know, had been described as "let on lease and

in the occupation of B.," whom the purchaser knew as a highly respectable and responsible person, the misdescription was considered not to admit of compensation. See *Ridgway v. Gray*, 1 Mac. & G. 109. That was a sale by the Court under a condition for compensation in case of misdescription, the amount of compensation to be settled by the Master. The Master in his report (dated 12th July, 1848) had assessed the compensation at 240*l.* (two years' rental of the property), the amount of the purchase-money being 2,100*l.* His method of assessment does not appear in the report. The Lord Chancellor (see report above cited, and Reg. Lib. 1848, B. 771) discharged the order directing the reference to the Master on the ground of informality, but also expressed an opinion that the case was not one for compensation. It is not clear whether the purchaser was entitled to rescind or not. In *Griessell v. Peto*, 2 Sm. & G. 39, where a house (in the result) leased to Lord B. was described as leased to Mr. A., the purchaser was neither allowed to rescind nor to insist on compensation.

The difference in value between two sums of 3*l.* 14*s.* and 3*l.* 15*s.*, redeemed land tax chargeable on two several properties, and six several sums of 1*l.* 12*s.*, 1*l.* 1*s.*, 1*l.* 1*s.*, 1*l.* 5*s.*, 1*l.* 5*s.*, and 1*l.* 5*s.*, chargeable respectively on different portions of the said two properties, does not admit of computation: *Cox v. Coventon*, 31 Beav. 378.

Misdescription of land tax.

In *Milligan v. Cooke*, 16 Ves. at p. 12, Lord Eldon questioned whether it were possible to estimate the difference in value between a covenant by the life tenant that his issue would renew certain leaseholds, such covenant binding all the real and personal assets of the covenantor, and a similar covenant merely binding such part thereof as he might devise and bequeath to his issue. But the Master was directed to ascertain the difference in value if possible, an option being given to the purchaser to take an indemnity, if he so preferred. See p. 14 of the report.

Value of a man's covenant.

It would seem that compensation could not be assessed in respect of reservations to the Crown of all land that might be required for public ways, of all timber required for naval purposes and public works, of all gold, silver, and coal, and the power of resumption at a valuation of all lands required for public purposes, especially as other land, not the subject of the

Reservations to the Crown.

contract, was included in the same grant by the Crown, and the whole was liable to forfeiture in case the conditions were not observed: *Westmacott v. Robins*, 4 D. F. & J. 390, where, however, the purchaser did not press for partial performance with abatement.

Sporting
rights.

It is doubtful whether the fact that third persons have a right of sporting over the property is a defect for which compensation could be assessed: *Burnell v. Brown*, 1 J. & W. 168.

Roads.

The measure of compensation for the description of an incomplete road as "made up" is not the cost of making up the road, but the difference between the actual value of the property in the condition in which it was at the time of the sale, and the value it would have had if the road had been made up as represented: *Re Chifferiel*, 40 Ch. D. 45.

11. Set-off.

Set-off.

If the purchaser claims compensation for the property being less valuable than it was described to be, and the vendor has in some other respect understated the value of the property, the Court will set-off the excess in the value of the property against the deficiency.

Where land was sold subject to the "Eau Brink" tax, and also to a corporation tax, and the amount of the Eau Brink tax was overstated, whilst that of the corporation tax was understated, the Court, in estimating the compensation due to the purchaser, deducted the difference in the amount of the Eau Brink tax from the amount of the excess of the corporation tax: *Townshend v. Granger*, 9 L. J. Ch. 176.

And similarly, if the vendor claims compensation under a condition for compensation, the Court will deduct compensation for any overstatement which he has made of the value of the property from the amount to be awarded to him as compensation for the property being more valuable.

Thus, where there was a deficiency of 10 acres in one parcel, and an excess of 20 acres in another, and the vendor claimed compensation under the condition, the deficiency was set off *pro tanto* against the excess: *Leslie v. Thompson*, 9 Ha. 263.

CHAPTER XIX.

INDEMNITY.

WHERE it is impossible to assess fairly the difference in value Indemnity. between the thing sold, and that which the vendor can convey, the Court sometimes, at the instance of the purchaser, instead of rescinding the contract, decrees partial performance with an indemnity, compelling the vendor either to execute some security (preferably of real estate), or to pay the purchase-money, or a sufficient portion thereof into Court to abide the event.

Thus, in *Milligan v. Cooke*, 16 Ves. 1, the Court ordered (the Inquiry. purchaser consenting to the form of order) an "inquiry what was the difference between the value of the interest so represented as proposed for sale, and the interest in the said lease, and if the Master shall find that he is unable to ascertain such difference in value, or if the purchaser shall declare himself content to take such interest as can be given him with an indemnity, the Master to settle such security by way of indemnity as it should appear just that the vendor should execute."

In *Halsey v. Grant*, 13 Ves. 73 (see p. 81), it was referred to the Master to inquire whether there ought to be any, and what, indemnity in respect of a fee farm rent of 19*l.* 6*s.* 0*d.* issuing out of a rectory, the tithes of which were being sold. The Master thought no indemnity was necessary: Reg. Lib. 1806, A. 251.

In *Horniblow v. Shirley*, 13 Ves. 81 (see p. 83), it was referred to the Master to set a value on the incumbrances or outgoing, or ascertain what might be a proper indemnity against the same.

In *Wilson v. Williams*, 3 Jur. N. S. 810, where the vendor's Dower. wife was prospectively entitled to dower if she survived him,

and the vendor was unable to procure her concurrence in the sale, the Court directed that a sufficient portion of the purchase-money should be set aside and retained in Court and invested, and that the vendor should receive the interest thereon during the joint lives of himself and his wife, and that the interest should be paid to her during her life if she survived her husband (in satisfaction of her dower), and the principal upon her decease should go to the vendor. It may be remarked on that case that the wife was not bound by the decree, that if the land increased in value the interest on the fund in Court might not have satisfied her claim to dower, and that the chance of the vendor's wife having dower, and the probable duration of such dower, could have been calculated by an actuary. See p. 149.

Is an indemnity compulsory on vendor?

In *Aylett v. Ashton*, 1 My. & Cr. 105, at p. 114, Pepys, M. R., held that the Court could not compel the vendor to give an indemnity, following the authority of Lord Eldon in *Balmanno v. Lumley*, 1 Ves. & B. 224.

In *Balmanno v. Lumley*, 1 Ves. & B. 224, Lord Eldon thought the Court could not compel the vendor to give an indemnity: but in that case it was possible to assess compensation, and compensation was allowed. There was, therefore, no necessity for compelling the vendor to give an indemnity.

In *Pocell v. South Wales Ry. Co.*, 1 Jur. N. S. 773, the vendor was compelled to give an indemnity as well as compensation. There the land sold contained $3\frac{1}{2}$ acres, and was part of an estate of 122 acres, the whole of which was subject to a rent-charge of 20*l.* per annum, which the vendor had not disclosed. In answer to the inquiry as to the amount of compensation, the Master found that the proper compensation would be to deduct from the purchase-money (1,700*l.*) such an amount as should bear to the value of the rent-charge (which he assessed at 500*l.*) the same proportion as the $3\frac{1}{2}$ acres bore to the whole estate of 122 acres, viz. 12*l.* 14*s.* 8*d.* Wood, V.-C., ordered 12*l.* 10*s.* to be deducted for compensation, and further directed the vendor to execute a conveyance of the property, and therein to covenant for himself, his heirs and assigns, to pay the annuity of 20*l.*, and that whilst the annuity should subsist the same should, as between the vendor, his heirs

and assigns, and the company and their successors, be chargeable upon the 119 acres remaining in his possession in exoneration of the lands so conveyed.

In *Bainbridge v. Kinnaird*, 32 Beav. 346, where the land sold was subject, together with other estates having a rent roll of 20,000*l.* a year, to a charge of 15,000*l.* for portions, Lord Romilly held that the purchaser was not entitled either to compensation or indemnity.

If compensation can be assessed the Court will assess it, and will not compel the vendor to give an indemnity merely because the purchaser thinks an indemnity would be more convenient: *Balmano v. Lumley*, 1 Ves. & B. 224.

If compensation can be fairly assessed, and the purchaser prefers compensation to an indemnity, the Court will decree compensation instead of the execution of an indemnity, because compensation is fairer to the purchaser. Purchaser may choose compensation,

"If the estate was purchased subject to a contingency affecting its immediate value, he (the purchaser) could not carry it to market. Property held subject to the question of indemnity remains unsaleable, unmarketable, and of infinitely less value than it would otherwise be": per Lord Eldon in *Milligan v. Cooke*, 16 Ves. 1.

In *Horniblow v. Shirley*, 13 Ves. 81, the vendor offered either compensation or an indemnity.

The purchaser cannot be forced to take an indemnity: *Fildes v. Hooker*, 3 Mad. 193, where the defect was essential and consequently entitled the purchaser to rescind altogether. See, also, per Lord Eldon in *Balmano v. Lumley*, 1 Ves. & B. 224; per Lord Cottenham in *Ridgway v. Gray*, 1 Mac. & G. 109; and per Lord Langdale in *Nouaille v. Flight*, 7 Beav. 521. and cannot be forced to take indemnity.

In *Wood v. Bernal*, 19 Ves. 220, Lord Eldon seems to have thought that a purchaser might be compelled to take an indemnity for a small incumbrance upon a considerable estate; but not where the incumbrance amounted to half the purchase-money. This was, however, mere *dictum*. In *Halsey v. Grant*, 13 Ves. 73, where the Court ordered the purchaser to complete with an indemnity if necessary, no indemnity was in fact given. See above p. 155.

CHAPTER XX.

RELIEF AFTER COMPLETION.

Relief after
completion.

AFTER the purchase-money has been paid to the vendor, and the conveyance has been executed, the purchaser will not, as a general rule, be entitled to relief for any misdescription, defect in title, &c., except on the covenants for title: *Clare v. Lamb*, L. R. 10 C. P. 334 (an action by the purchaser for money had and received).

Execution of
conveyance.

It is the execution of the conveyance, and not the mere payment of the purchase-money, which bars the purchaser's rights. Even the taking of possession and payment of purchase-money will not debar the purchaser of his right to rescind, and recover the purchase-money, provided the conveyance has not been executed. See *Cripps v. Reade*, 6 T. R. 606 (before conveyance), and *Thomas v. Powell*, 2 Cox, 394 (after conveyance).

Purchase-
money applied
to incum-
brances.

If the purchase-money has not been paid to the vendor (as where it has been paid into Court, or part of it has been paid to the vendor and the remainder secured by the purchaser's bond), the purchaser is entitled, even after the conveyance has been executed, to have any incumbrances which have been created by the vendor himself, or to which the covenants for title in the conveyance apply, paid off out of the purchase-money: Sug. 548; Dart, 905, 906; *Tourville v. Naish*, 3 P. W. 306; *Woods v. Martin*, 11 Ir. Ch. R. 148. In the latter case arrears for head rent due before the execution of the conveyance were paid off out of the unpaid purchase-money secured by the bond of the purchaser.

But the purchaser may not have the purchase-money applied in payment of other incumbrances: Dart, 905, 906. Nor could he after conveyance rescind on the ground of a defect in the title

not having been properly disclosed by the abstract: per Wood, V.-C., *McCulloch v. Gregory*, 24 L. J. Ch. 246, at p. 248.

The chief exceptions to the rule above stated are:—cases of fraud, “common mistake,” and a right to compensation under a condition for compensation not limited to demands made before completion. As to the case of fraud, see Chapter IX., p. 82; “common mistake,” Chapter VIII., p. 74; and condition for compensation, Chapter XXIX., p. 258.

The case of *Crompton v. Lord Melbourne*, 5 Sim. 353, is akin to the cases where compensation has been granted under a condition for compensation, although the conveyance has been executed. There land was wrongly described as tithe free, and upon completion part of the purchase-money was set apart and invested to provide compensation in case the vicar of L. should turn out to be entitled to the tithes. It was afterwards discovered that the lands were in the S. parish, and that the rector of S. was entitled to them. It was held that the purchaser was entitled to compensation out of the money so set apart on the ground partly that the sale had not been completed, and partly that there were documents in the possession of the vendors which would have shown them that the rector of S. was entitled to tithes out of the land sold.

The case of *Leuty v. Hillas*, 2 De G. & J. 110, was the case of a mistake in the conveyance itself. On a sale in lots, A. and B. purchased adjoining lots. The conveyance to A., by mistake, comprised a yard and stable, part of B.'s lot, and this part was by mistake omitted from the conveyance to B. The description in the particulars was sufficient to fix A. with notice that he was not buying the yard and stable. It was held that B. was entitled to a conveyance thereof from A. Mistake in conveyance.

Ancillary Relief.

If the sale is set aside after conveyance, the purchaser will, in addition to having his purchase-money repaid, be allowed all necessary outgoings, and also repairs and improvements executed by him before the discovery of the fraud or “common mistake” if asked for in the pleadings: *Edwards v. M'Leay*, 2 Sw. 287, at p. 289. He will also be allowed his costs of the purchase, Outgoings.

including costs of the conveyance: *ibid.*; and to interest at 4l. per cent. per annum upon such outgoings and costs. See form of decree in *Gibson v. D'Este*, 2 Y. & C. C. C. 542, at p. 581.

Rents.

On the other hand, the purchaser will have to account for the rents which he has received: *Gibson v. D'Este*, 2 Y. & C. C. C. at p. 581. And the account is taken, it would seem, on the footing of wilful default: *ibid.* But it is difficult to see why a purchaser should be in a worse position than a vendor, who is not made to account on the footing of wilful default unless there are special circumstances. See p. 298.

Occupation.

If the estate or part of it has been in the purchaser's personal occupation, he will be charged with an occupation rent: *Gibson v. D'Este*, 2 Y. & C. C. C. at p. 581.

Concealment
criminal.

If the vendor, or his solicitor, or agent, conceals from the purchaser any incumbrance on the property, or any settlement, deed, will, or other instrument material to the title, or falsifies any pedigree upon which the title may depend, in order to induce him to accept the title offered or produced to him, with intent, in any of such cases, to defraud, this is a misdemeanour. See 22 & 23 Vict. c. 35, s. 24. The vendor, or his solicitor, or agent, so acting will also be liable to an action for damages at the suit of the purchaser, or those claiming under him, for any loss sustained by him or them in consequence of the settlement, deed, will, or other instrument or incumbrance so concealed, or of any claim made by any person under such pedigree, but whose right was concealed by the falsification of such pedigree: *ibid.*

In estimating such damages where the estate shall be recovered from such purchaser, or from those claiming under him, regard shall be had to any expenditure by him or them in improvements on the land: *ibid.*

CHAPTER XXI.

PAROL VARIATION.

By the Statute of Frauds, sect. 4, contracts affecting land must be in writing. See Part III. p. 375. Statute of Frauds.

By a general rule of law, even independently of the Statute of Frauds, when a contract has been reduced to writing, parol evidence is inadmissible to contradict, vary, or add to its terms, but is admissible for the purpose of proving fraud, misrepresentation, mistake, or any other fact which has any effect on the validity of the written contract, or the rights of either party to have it cancelled, rectified, rescinded, or specifically performed. Contract reduced to writing.

The question of the validity of contracts belongs to the general law of contract, as also do questions of mistake in reducing the terms of a contract to writing (the remedy for which is rectification of the contract), and of mistake by the person signing the contract as to what document he is signing (the remedy for which is cancellation). Mistake is considered in Chapter VIII. p. 74; and fraud in Chapter IX. p. 82.

The present chapter deals with the admission of evidence of parol variations, whether by way of representation or contract, as affecting the rights of vendors and purchasers to specific performance or rescission, and deals also with collateral agreements by parol, and the right to recover damages for the breach thereof. Parol variations.

If the vendor or his agent has made any verbal description or representation to the purchaser, adding to or varying that contained in the written contract, then the respective rights of the vendor and purchaser, classified according to legal remedies, are as follows:—

First, as to specific performance.

(1.) The vendor cannot enforce specific performance of the contract *with* the parol variation or addition if the purchaser refuses to have the variation or addition read into the contract:

W.

M

Specific performance.
(1) Vendor asking for specific performance *with*

verbal addition.

Higginson v. Clouces, 15 Ves. 516. See, also, *Manser v. Back*, 6 Hare, 443, at p. 447; *Heywood v. Mallalieu*, 25 Ch. D. 357; and *Caballero v. Henty*, 9 Ch. 447.

This rule holds good notwithstanding the purchaser may have signed a written agreement referring to the verbal variation. Thus, in *Higginson v. Clouces* (see above), the defendant had bound himself to "a strict fulfilment of this article, and to abide by the conditions and declarations made at this sale."

In *Pember v. Mathers*, 1 Bro. C. C. 52, parol evidence was admitted on plaintiff's behalf of a promise on the faith of which the plaintiff entered into the contract; but this case is doubted in *Clarke v. Grant*, 14 Ves. 519, at p. 525, and seems to be opposed to the current of authority. As a matter of principle, there is, as Lord Justice Fry points out (Sp. Perf. p. 349), an inconsistency in the Courts declining to receive parol evidence on behalf of a plaintiff seeking to correct a mere written contract, and receiving it on behalf of a plaintiff claiming to have a deed rectified; but the inconsistency will probably remain until the Statute of Frauds is repealed.

The case of *Farebrother v. Gibson*, 1 De G. & J. 602, is not at variance with this rule. There the particulars of sale described the property as "in the occupation of the C. L. Company under a lease." The company were in occupation by virtue of a lease granted to A., B., and C., their trustees. The purchaser was verbally informed by the vendor's solicitor before the sale that A. and B. were the names of two of the lessees. After the sale the purchaser refused to complete, on the ground that he had understood from the particulars that the lease was to the company itself. In an interpleader suit by the auctioneer, which by consent was treated as a suit by the vendor for specific performance, evidence of this verbal statement was admitted on behalf of the vendor, and the purchaser was held to his bargain. It will be observed that this was not a case of a vendor varying the written contract by a verbal declaration; the question was whether the purchaser was deceived by the ambiguity in the particulars, and evidence of the verbal declaration was admitted to show that he was not deceived. The decision, therefore, was, as Knight-Bruce, L. J., said (p. 605),

"quite consistent with all the authorities, both at common law and in equity, as to the inadmissibility of parol communications to affect a subsequent written contract." See the remarks of Jessel, M. R., on this case in *Cato v. Thompson*, 9 Q. B. Div. 616, at p. 619, where, however, the facts of *Farebrother v. Gibson* are incorrectly stated.

The case of *Cowley v. Watts*, 21 L. T. 97, clearly shows the distinction between admitting parol evidence to prove that the purchaser was not deceived, and admitting it for the purpose of varying the contract itself. In that case, a suit by the vendor for specific performance, evidence of particulars and conditions of sale was admitted for the purpose of proving that the purchaser knew what the vendor's interest was, but the particulars and conditions were held not to be incorporated in the contract.

The case of *Jervis v. Berridge*, L. R. 8 Ch. 351, does not conflict with the rule above stated. The purchaser, who was one of the defendants in that case, sought to set up a transfer, executed by the plaintiffs, the vendors, in pursuance of a verbal contract with him, for the purpose of preventing the plaintiffs from enforcing not only their verbal contract with him, but also their written contract with the other defendants. He was not endeavouring to prevent the vendors from enforcing a written contract with a verbal variation, because there was no written contract between him and the vendors at all; and he was in the position of an assailant, and therefore virtually a plaintiff rather than a defendant. Lord Selborne, at p. 360, in words approved by him in *Hussey v. Horne-Payne*, 4 App. Ca. at p. 323, lays down the doctrine that "the Statute of Frauds is a weapon of defence, not offence, and does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties."

(2.) The vendor cannot enforce specific performance of the contract *without* the parol variation, if the purchaser insists upon having the variation read into the agreement.

(2) Vendor asking specific performance without verbal addition.

The parol variation may consist in an undertaking by the vendor to do some act either on the property sold or on other property; this would amount to an additional parol contract,

which, though not capable of being specifically enforced by the purchaser, will, upon the neglect of the vendor to carry it out, entitle the purchaser to resist specific performance. In *Myers v. Watson*, 1 Sim. N. S. 523; 10 H. L. Ca. 672 (under the name of *Rose v. Watson*), specific performance was refused to a vendor who had not carried out a verbal undertaking to build a church on adjacent property. In *Lamare v. Dixon*, L. R. 6 H. L. 414, the non-fulfilment by the lessor of a verbal agreement to make the wine vaults dry, was held sufficient to entitle the lessee to resist specific performance of an agreement for a lease of the vaults.

Lamare v. Dixon overrules the case of *Phipps v. Child*, 3 Dr. 709 (which was not, however, mentioned in *Lamare v. Dixon*). In *Phipps v. Child*, Kindersley, V.-C., refused to import into an agreement for sale of a mine a parol agreement by the plaintiff to relieve the mines from flooding.

The rule above stated was not observed in the case of *Croome v. Lediard*, 2 My. & K. 251. In that case A. agreed to sell, and B. to buy, the L. estate, and by the same written contract B. agreed to sell, and A. to buy, the H. estate, and the contract did not expressly state that the two agreements were dependent on each other; it was held that A. was entitled to specific performance of his contract to sell the L. estate, although, owing to defective title, B. could not enforce the sale of the H. estate, and evidence offered by B. that the two agreements were meant to be dependent on each other was not admitted. The correctness of this decision, so far as the exclusion of the evidence of a parol variation is concerned, may be doubted; and it might have been reasonably held, from the fact of the two contracts being contained in the same document, that they were meant to be mutually inter-dependent, and that the transaction really amounted to an agreement for an exchange.

(3) Purchaser asking specific performance with verbal addition.

(3.) The purchaser cannot enforce specific performance with the parol variation if the vendor objects to the variation.

See *Woollam v. Hearn*, 7 Ves. 211, and *Clowes v. Higginson*, 1 Ves. & B. 524. In the first of those cases, Grant, M. R., said, at p. 219: "If this had been a bill brought by this defendant for a specific performance, I should have been bound by the

decisions to admit the parol evidence and to refuse a specific performance. But this evidence is offered not for the purpose of resisting, but of obtaining a decree; first, to falsify the written agreement, and then to substitute in its place a parol agreement to be executed by the Court."

A purchaser who is defendant in an action for specific performance brought by the vendor, may adduce parol evidence of an agreement to give compensation for the purpose of resisting specific performance, but not for the purpose of obtaining compensation, because in the latter case he would be virtually a plaintiff in a cross-action.

Thus, in *Winch v. Winchester*, 1 Ves. & B. 375, at p. 378, Grant, M. R., says: "As to the admissibility of the evidence, it must depend upon the purpose for which it is produced. If the defendant insists that, the evidence being received, he will be entitled to have the contract performed, with an abatement of the price, I think it not admissible for that purpose, as the Court cannot execute in his favour a written agreement with a variation introduced by parol testimony; but if he says he was deceived by this representation, and therefore was induced by fraud to enter into the contract, and offers evidence for the purpose of getting rid of such contract altogether, for that purpose I think it may be received."

(4.) The purchaser cannot enforce specific performance *without* the variation, if the vendor insists upon having the variation read into the agreement.

(4) Purchaser asking specific performance without verbal addition.

Thus, in *Manser v. Back*, 6 Hare, 443, several copies of the printed particulars were altered in writing, and laid on the table in the auction room (see p. 449), and the auctioneer read the altered particulars aloud, though without expressly calling attention to the alteration. Inadvertently an unaltered copy of the particulars was signed by auctioneer and purchaser. The Court held that the purchaser could not enforce specific performance according to the unaltered particulars, although he had not heard the auctioneer read the altered copy, and knew nothing of the alteration. The case of *The Marquis of Townshend v. Stanger*, 6 Ves. 328, is an illustration of this rule, and also of rule 1. See p. 161, above. There Lord Eldon dismissed a bill

by the lessor for specific performance with a parol variation, and a cross-bill by the lessee for specific performance without the variation.

Perhaps rule 4 above should be stated subject to the proviso following: "Provided that the vendor must prove *either* that the purchaser heard and understoed the variation, *or* that the auctioneer exceeded his instructions in using particulars and signing a contract which did not contain the variation."

The rule, as stated in Dart, p. 124, is: "If the Court were clearly satisfied that he" (*i.e.*, the purchaser) "heard and understood the effect of the verbal declarations, he probably would not obtain a decree for specific performance without the variations." But in *Manser v. Back*, 6 Hare, 443, the purchaser failed to obtain his decree, although the Court was satisfied that he did not hear the verbal declarations.

(5) Specific performance giving defendant election.

(5.) The plaintiff (whether he be vendor or purchaser) may, by allowing the defendant to elect whether the variation shall be inserted or not, enforce specific performance of the contract, with the variation if defendant desires it; if not, without the variation. See *Ramsbottom v. Gosden*, 1 Ves. & B. 165, at p. 169; *Donald v. Scott*, 10 Ir. Ch. R. 496; *Barnard v. Cave*, 26 Beav. 253.

Reasonable time to be given.

But the plaintiff must assent to the defendant's view within a reasonable time. Thus, in *Legal v. Miller*, 2 Ves. sen. 299, after the defendant had succeeded in proving the parol variation, the plaintiff turned round and claimed, under his prayer for "general relief," specific performance of the contract so varied. The defendant was held entitled to resist this claim on the ground of surprise, and probably also of the expense incurred by the defendant, which would not have been incurred had the plaintiff adopted the parol variation at an earlier date.

Rescission.

When purchaser can rescind.

Second, as to rescission.

(1.) Where the vendor refuses to complete *with* the variation, or is unable to make a good title with the variation, the purchaser may rescind. See *Winch v. Winchester*, 1 Ves. & B. 375, at p. 378.

(2.) Where the vendor refuses to complete *without* the variation, or is unable to make a good title without the variation, the pur-

chaser is entitled to rescind the contract, unless the vendor can prove the purchaser heard the parol variation.

In *Torrance v. Bolton*, 14 Eq. 124 (affirmed, L. R. 8 Ch. 118), the conditions of sale containing the variation were read for the first time in the auction room, and the purchaser stated that he did not hear distinctly or pay much attention to what was read, *Malins, V.-C.*, at p. 133, said: "If the defendant had only taken the precaution to have the conditions printed and handed to all the gentlemen in the room, and the auctioneer had requested them to follow him whilst he read them, and it had been proved that the plaintiff had had them in his hands, this controversy could not have arisen."

Collateral Agreements.

It is difficult to say in what cases two contemporary, or nearly contemporary, agreements relating to the same subject, and entered into by the same parties, will be regarded as forming one contract which must be enforced altogether or not at all, so that if one of the agreements is reduced to writing and the other remains verbal, the party seeking to enforce the first must, if the defendant so insist, perform the second also. Collateral agreements.

On an agreement to grant a lease of wine vaults, a collateral verbal agreement by the lessor to make the wine vaults dry was treated as forming part of the contract to grant the lease, and the non-fulfilment of the verbal agreement by the lessor was held to entitle the lessee to resist the lessor's action for specific performance: *Lamare v. Dixon*, L. R. 6 H. L. 414. On the other hand, the non-fulfilment by the vendor of a verbal agreement to pump a mine dry, was not held to entitle the purchaser to resist the vendor's action for specific performance of a written contract for the purchase of the mine: *Phipps v. Child*, 3 Dr. 709 (which it appears was not cited to the Court in *Lamare v. Dixon*). See above, p. 164.

But even if a collateral verbal agreement cannot be relied on by the defendant as a defence to an action for specific performance, he may recover damages for the breach thereof, if it be an agreement which is not required to be in writing on account of the Statute of Frauds, and if it be not inconsistent with the Damages.

express terms of the written agreement. It is, perhaps, also necessary to prove that the verbal agreement was calculated to induce, and did induce, the party alleging it to enter into the written contract, and that the written contract was not intended to contain the whole agreement between the parties.

Damages have been given for the breach of a verbal undertaking to destroy rabbits, given by the landlord contemporaneously with a written agreement for a lease, although the lease gave the landlord an unrestricted right of shooting: *Morgan v. Griffith*, L. R. 6 Exch. 70.

Also, for the breach of a verbal agreement to kill down the game, and not to let the shooting: *Erskine v. Adeane*, 8 Ch. 756.

Also, for the breach of the following verbal agreement by the lessor, "If you will become my tenant I will undertake to put the house in repair, and send more furniture into it": *Angell v. Duke*, L. R. 10 Q. B. 174.

If the auctioneer verbally makes a misrepresentation as to some point not mentioned in the particulars, whereby the purchaser is induced to give a larger price for the property, evidence of this misrepresentation is admissible in an action by the purchaser for damages against the vendor. See *Brett v. Clouser*, 5 C. P. D. 376, at p. 386. As, however, in that case, the purchaser had accepted a conveyance in accordance with the particulars, he was precluded from getting relief. See, on this point, Chapter XX. p. 158.

Effect of
reading lease.

If the auctioneer reads a lease which is not mentioned in the particulars, and the purchaser swears he did not hear him, the purchaser is not affected with notice of the lease: *Caballero v. Henty*, 9 Ch. 447; and see Chapter VII. p. 64.

If the vendor has misstated the effect of a lease in the particulars, he is bound by his misdescription, even though the auctioneer read the lease: *Jones v. Edney*, 3 Campb. 285.

Subsequent Parol Variation.

Subsequent
parol varia-
tion.

A *subsequent* parol variation (with the exception of stipulations as to time or title, or merely ancillary matters) will not be enforced, even in the negative method in which a prior or collateral parol variation can be enforced (*Price v. Dyer*, 17 Ves.

356), unless there has been part performance: *Legal v. Miller*, 2 Ves. sen. 299. But rule (5), p. 166, applies here too; viz., that the plaintiff may enforce specific performance by agreeing to have the variation also performed or not at the defendant's option: *Robinson v. Page*, 3 Russ. 114. And a written contract required to be in writing by the Statute of Frauds may be altogether rescinded by a parol contract: per Grant, M. R., in *Ex parte Earl of Ilchester*, 7 Ves. 348, at p. 377.

Snelling v. Thomas, 17 Eq. 303, exemplifies the rule above mentioned as to the enforcement of a subsequent parol variation. In that case there was an agreement in writing to take an underlease containing the same covenants as those in the superior lease; the sub-lessee afterwards verbally approved of an underlease containing a restrictive covenant which was not in the superior lease; it was held that the sub-lessor could not compel the sub-lessee to take an underlease in the form verbally approved by him.

PART II.

CONDITIONS OF SALE.

CHAPTER XXII.

GENERAL REMARKS; CONSTRUCTION OF CONDITIONS OF SALE.

Particulars
versus
conditions.

THE proper office of the particulars is to describe the subject-matter of the contract; that of the conditions to state the terms on which it is sold: per Malins, V.-C., in *Torrance v. Bolton*, 14 Eq. 124, at p. 130.

A misrepresentation in the particulars cannot be cured by information given in the conditions.

It sometimes happens that a condition, if carefully read, would enlighten a purchaser as to some point about which the particulars give incorrect information. Thus, where "four freehold ground rents of 19*l.* 4*s.* each, viz., 15*l.* ground rent and 4*l.* 4*s.* garden rent," were put up for sale, there was a condition that the conveyance should contain "a grant on the part of the vendors of the perpetual right of user of the respective gardens now enjoyed by the tenants of each house as appurtenant to each house . . . ; but no title to the gardens is to be required by any purchaser." The Court held that as the 4*l.* 4*s.* could not be properly described as a "freehold ground rent," the purchaser might rescind, although the condition, if carefully read, might have corrected the misdescription: *Evans v. Robins*, 31 L. J. Ex. 465.

Where on a sale in lots the particulars contained a statement appended to lot C and lot D that the timber was to be paid for, but no such statement was appended to lot A or lot B, the pur-

chasers of lots A and B were held entitled to assume that they would not have to pay separately for the timber ; and a general condition that timber must be paid for by valuation was considered insufficient to correct the impression made by the statements in the particulars : *Higginson v. Clowes*, 15 Ves. 516.

If the particulars omit information as to mortgages and other Incumbrances on the property, mention or notice of such matters in the conditions will not rectify the omission.

See, as to mortgages, *Torrance v. Bolton*, 8 Ch. 118 ; and as to ground rent to which the property is liable, *Jones v. Rimmer*, 14 Ch. Div. 588.

In *Torrance v. Bolton* the conditions were read aloud at the sale, and the purchaser did not hear them ; they were not attached to the particulars. In *Jones v. Rimmer* the ground rent was not expressly mentioned in the conditions ; but the condition as to title mentioned the lease, and another condition stipulated that the purchaser should covenant to pay the rent under the lease.

A mere ambiguity in the particulars of sale may be corrected Ambiguity. by the conditions. See p. 48, and *Camberwell case*, 13 Ch. D. 754.

And an ambiguity in the conditions may be cured by a clearer statement in the particulars. Thus, where the conditions provided for "possession" being given to the purchaser by a certain day, but the particulars stated that the property was "in the occupation of X.," the purchaser was considered as having notice that he could not get vacant possession on the day named : *Lake v. Dean*, 28 Beav. 607.

Conditions of sale must be framed in good faith, and must Bona fides. not be calculated to deceive. For instance, the purchaser must not be required to "assume" that which the vendor knows to be false : *Re Banister*, 12 Ch. Div. 131, at p. 146. See instances below at p. 223.

If a condition is not clearly worded it will be construed favourably to the purchaser. Construction. "When a man sells property under stipulations which are against common right, and place the purchaser in a position less advantageous than that in which he otherwise would be, it is incumbent on the vendor to express himself with reasonable clearness ; and if he uses expressions

reasonably capable of misconstruction—if he uses ambiguous words—the purchaser may generally construe them in the manner most advantageous to himself”: *Seaton v. Mapp*, 2 Coll. 556.

Conditions of sale “must be construed, like every other instrument, most strongly against the person who frames them, because the vendor alone can be the sole judge of the necessity or propriety of making such conditions before he offers the property for sale”: *Romilly, M. R.*, in *Greaves v. Wilson*, 25 Beav. 290; see, too, *Symons v. James*, 1 Y. & C. C. C. 487, 490.

This rule is specially applicable to any new or unusual conditions of sale, “the meaning of which no purchaser knows until *ex post facto* decisions of a court of justice inform him of it”: *Wigram, V.-C.*, in *Morley v. Cook*, 2 Ha. 106, 115.

And even if the stipulations were prepared by the purchaser, they are construed favourably to him: *Rhodes v. Ibbetson*, 4 D. M. & G. 787.

The rule of construing conditions favourably to the purchaser has been carried so far that the same phrase has received a different construction in a condition giving the vendor a benefit from that which it has received in a condition giving a benefit to the purchaser. Thus, a condition allowing compensation to the vendor has been differently construed from a condition allowing compensation to the purchaser. See *Cordingley v. Cheeseborough*, 4 D. F. & J. 379, where Lord Westbury said (p. 384): “This rule of construction only applies where the vendor seeks to enforce the contract, not where the purchaser is seeking the benefit of a stipulation giving him a right to a deduction from his purchase-money.”

True rule of
construction.

But the sounder principle is that the construction is the same in both cases where the same words are used, but that the condition, although sufficient to cover the point in dispute, will not be enforced at the vendor’s instance if it would be unfair that he should avail himself of it. Conditions of sale “are to be construed in precisely the same manner in a court of law as in a court of equity. They are to be construed according to the ordinary interpretation of language as used in business, unless there is something in the contract or something in the subject-matter which obliges the Court—not which entitles the Court,

but which obliges the Court—to read the language otherwise than in its ordinary sense”: per Lord Esher, M. R., *Re Terry and White*, 32 Ch. Div. p. 23.

The cause of the confusion between the construction of the contract, and the question whether the contract was reasonable and ought to be enforced, is that the Court is not as a rule compelled to determine the meaning of the contract in cases where it relieves the purchaser from fulfilment thereof. The Court says the contract means so and so, and if it does not, then it is an unreasonable contract, and ought to be relieved against.

The Conveyancing Act, 1881, s. 3, sub-s. 11, shows that the statutory conditions implied in all sales are to be construed as if they had been conditions framed by the vendor himself, and printed at length with the other conditions of sale. See *Nottingham Patent Brick and Tile Company v. Butler*, 15 Q. B. D. 261, at p. 272; *affd.* 16 Q. B. D. 778. The sub-section is as follows: “Nothing in this section shall be construed as binding a purchaser to complete his purchase in any case where, on a contract made independently of this section, and containing stipulations similar to the provisions of this section, or any of them, specific performance of the contract would not be enforced against him by the Court.”

If a condition contains a statement of fact, the purchaser may require proof of such fact: *Symons v. James*, 1 Y. & C. C. C. 487.

A vendor who has inadvertently inserted a condition, will be relieved against his mistake if the purchaser is not thereby prejudiced.

Thus, where a mortgagee who had foreclosed, inserted, through mistake, the condition as to covenants for title generally employed by mortgagees selling under a power of sale, he was relieved from the mistake, and allowed to deduce title and convey as absolute owner: *Watson v. Marston*, 4 D. M. & G. 230.

But if the purchaser would be prejudiced, the Court will not, in an action for specific performance, alter the condition, even though it is clear that, through mistake, the wrong word, or the wrong condition, has been employed: see *Browne v. Paull*, 26 L. T. 232.

The question sometimes arises, What are reasonable stipula-

Statutory
conditions.

Facts stated
in conditions.

Vendor's
mistake.

Reasonable
conditions.

tions as to title, &c., to be inserted in a contract for sale? Where the purchaser had paid the deposit before the contract was drawn up, taking a receipt from the vendor referring to "the contract which is now being prepared, to be signed by the vendor and purchaser," and the vendor afterwards tendered a contract containing stipulations that the purchaser should pay the expense of investigating the title, and that if the purchaser should insist upon any objection, which the vendor should be unable or unwilling to remove, the vendor might rescind, it was held that these stipulations were unreasonable: *Moeser v. Wisker*, L. R. 6 C. P. 120.

CHAPTER XXIII.

RESERVE PRICE—PUFFING.

ON a sale by auction the conditions of sale may (1) state there is a reserved price, or that the vendor reserves a right to bid, or both; or (2) state that the sale is without reserve; or (3) be silent on the point, or merely state that the highest bidder is to be the purchaser.

Reserve
price, &c.

(i.) *Sale with Reserve.*

The Sale of Land by Auction Act, 1867, s. 5, after reciting that "as sales of land by auction are now conducted, many of such sales are illegal, and could not be enforced against an unwilling purchaser, and it is expedient for the safety of both seller and purchaser that such sales should be so conducted as to be binding on both parties," enacts that "the particulars or conditions of sale by auction of any land shall state whether such land will be sold without reserve, or subject to a reserved price, or whether a right to bid is reserved; if it is stated that such land will be sold without reserve, or to that effect, then it shall not be lawful for the seller to employ any person to bid at such sale, or for the auctioneer to take knowingly any bidding from any such person."

Sale of Land
by Auction
Act, 1867,
sect. 5.

Sect. 6 of the same Act enacts, "where any sale by auction of land is declared, either in the particulars or conditions of such sale, to be subject to a right for the seller to bid, it shall be lawful for the seller, or any one person on his behalf, to bid at such auction in such manner as he may think proper."

Sect. 6.

It is not easy to see what alteration sect. 6 made in the law. A vendor who reserved a right of bidding was always entitled to bid by himself, or a single agent. In *Parfitt v. Jepson*, 46 L. J. C. P. 529, Lindley, L. J., says that this section "seems to curtail the vendor's right, and to cut it down to a bid by only one person on his behalf." But even before the Act it would seem that a vendor who reserved the right of bidding could only employ one person to bid for him (called a "puffer"); because

Old law.

the employment of a puffer was only defensible on the ground of protecting the estate against a sale at an undervalue, and the employment of more than one puffer would not be necessary for this purpose, but would show a design on the part of the vendor to screw up the price by taking advantage of the ignorance of *bonâ fide* bidders. See the remarks of Grant, M. R., in *Smith v. Clarke*, 12 Ves. 477, 483. See also *Wheeler v. Collier*, M. & M. 123, and Sug. p. 10.

Sale in lots. Probably sect. 6 has the effect of preventing a vendor, on a sale in lots, from being entitled to employ different bidders for the different lots, which Dart (p. 225) thought could be done before the Act.

Disputed bidding. The auctioneer may not bid a higher sum than that fixed as the reserved bidding, even though he so bids for the sake of settling a dispute between two persons who claim to have made the same bid. Thus, where the reserved bidding was fixed at 3,000*l.*, and two persons claimed to have bid 3,400*l.*, a bid by the auctioneer of 3,500*l.* was held to be unjustifiable. The persons bidding 3,400*l.* were not, however, held entitled to insist on having the property put up for sale again: *Notley v. Salmon*, 1 W. R. 240.

Purchaser's remedy. If the vendor exceeds the limited right of bidding which he has reserved, as where the vendor reserves the right to bid by himself, and bids by means of a third person, the sale may be avoided by the purchaser: *Rex v. Marsh*, 3 Y. & J. 331.

Right of bidding once. Where the condition was that "the vendor should have the right by himself or his agent of bidding *once*," and the auctioneer, with the vendor's sanction, bid *three* times, and then the vendor stated what the reserved price was, a purchaser, who then bid beyond the reserved price, was held entitled to avoid the purchase: *Parfitt v. Jepson*, 46 L. J. C. P. 529.

Reserve price and right to bid. A condition that "the sale is subject to a reserved bidding" will not be construed as a condition that "the sale is subject to a reserved price *and* to a right to the vendor to bid." Such a condition merely means "subject to a reserved price," and it is insufficient to enable the vendor to bid, or employ a person to bid, up to the reserve: *Gilliat v. Gilliat*, 9 Eq. 60.

Mock biddings. Even where the vendors reserve the right "of bidding once or oftener, by themselves or their agent," the auctioneer may

not make a series of mock biddings one after the other : *Heatley v. Newton*, 19 Ch. Div. 326. An auctioneer so acting is personally liable to the purchaser for damages : *Ibid.*

Where the vendor has reserved the right to bid, the contract will be binding on a purchaser, although there are no bidders but the purchaser and the puffer : *Bowles v. Round*, 5 Ves. 209. No other bids.

(ii.) *Sale without Reserve.*

Where the sale is stated to be without reserve, the vendor may not bid or employ any person to bid or make any private agreement which would have the effect of putting a reserved price on the property ; and the auctioneer may not take knowingly any bidding from the vendor or his agent : *Sale of Land by Auction Act*, 1867, s. 5 ; see above, p. 175. This was the law even before the Act : see *Meadows v. Tanner*, 5 Mad. 34 ; and *Thornett v. Haines*, 15 M. & W. 367. Sale without reserve.

Where, previously to a sale which was advertised to be "without reserve," the vendor entered into a private agreement with another person that the latter should bid 35,000*l.* at the auction, and that if there should be no higher bidding the property should be knocked down to him at that sum, this agreement was held to be inconsistent with the contract held out to the public by the vendor ; and a purchaser who had bid 49,800*l.* was allowed to repudiate the purchase : *Robinson v. Wall*, 2 Ph. 372. Previous agreement.

"When a property is offered for sale without reserve, the meaning is that of the bidders—the public—who choose to attend the sale, whoever bids the highest shall be the purchaser ; that the biddings shall be left to themselves, and that there shall be no bidding on the part of the vendor. The term 'without reserve' excludes any interference on the part of the vendor (or, which is the same thing, of those who come in under the vendor) which can under any possible circumstances affect the right of the highest bidder to have the property knocked down to him, and that without reference to the amount to which that highest bidding shall go" : per Lord Cottenham, *Ibid.*, p. 375.

Where, on a sale by the Court at the suit of a mortgagee, with liberty to all parties to bid, the auctioneer stated "that the No reserve, but liberty to bid.

sale was without reserve, but that the parties were at liberty to bid" (the conditions of sale being silent on the point), it was held that the mortgagee's bidding did not vitiate the sale: *Dimmock v. Hallett*, 2 Ch. 21 (decided before the Sale of Land by Auction Act, 1867). Per Turner, L. J.: "The two branches of the statement are not very consistent, but I think that they may be read together by taking the second as a qualification of the first." Per Cairns, L. J.: "The statement means that all parties were at liberty to bid, but that every bidding, if accepted, would make a contract."

Auctioneer's
liability.

Where the conditions state that the sale is "without reserve," the auctioneer is liable to pay damages to the highest *bond fide* bidder for breach of contract if the vendor bids at the sale: *semble*, *Warlow v. Harrison*, 29 L. J. Q. B. 14; even if the condition was inserted without the vendor's authority: *Ibid*.

But where property advertised "for peremptory sale by auction by direction of the mortgagee" was bought in at the auction by the vendor, the auctioneer was not made personally liable to an intending purchaser (the highest bidder other than the vendor's agent) for not selling peremptorily: *Mainprice v. Westley*, 11 Jur. N. S. 975. The authority of *Warlow v. Harrison* was doubted by Blackburn, J., in *Mainprice v. Westley*.

(iii.) *No mention of "reserve" in Conditions.*

No mention
of reserve.

Where the conditions of sale are silent on the point, the sale will be understood to be made without reserve, and the vendor will not be entitled to bid; and if he does bid, either by himself or by an agent, the sale will be voidable at the option of the purchaser.

Old rule at
law,

in equity.

This was, even before the enactment mentioned below, the rule at law: *Bezzell v. Christie*, Cowp. 395 (*Howard v. Castle*, 6 T. R. 642: see remarks in *Thornett v. Haines*, 15 M. & W. 367, and *Crowder v. Austin*, 3 Bing. 368). But in equity a vendor was entitled to employ a single bidder to bid up to a reserve price in order to prevent a sale at an undervalue (*Bramley v. Alt*, 3 Ves. 620, and *Conolly v. Parsons* in note thereto; *Woodward v. Miller*, 2 Coll. 279; *Flint v. Woodin*, 9 Ha. 618); but not to enhance the price indefinitely (see *Smith*

v. *Clarke*, 12 Ves. 483, and *Flint v. Woodin*, 9 Ha. 618); nor to employ more bidders than one, even though they were limited to the same sum: *Wheeler v. Collier*, M. & M. 123. This rule of equity was to some extent questioned by Lord Cranworth in *Mortimer v. Bell*, 1 Ch. 10. But the conflict and doubt were both removed by the Sale of Land by Auction Act, 1867, s. 4, which, after reciting that there was a conflict between the Courts of law and equity "in respect of the validity of sales by auction of land where a puffer has bid, although no right of bidding on behalf of the owner was reserved," enacted that "whenever a sale by auction of land would be invalid at law by reason of the employment of a puffer, the same shall be deemed invalid in equity as well as at law." Sale of Land
by Auction
Act, 1867,
sect. 4.

Sect. 5 of the same Act (set out at p. 175, above) enacting that the particulars or conditions must state whether the sale is without reserve, &c., might conceivably be construed so as to have the effect of making the sale voidable at the option of the purchaser if the particulars and conditions are silent on the subject of a reserve. But the object of the section is merely to prevent the vendor from selling at a reserve price, or bidding at the sale, without previously informing the purchaser of his intention either in the particulars or conditions, and that object is attained by making the sale voidable at the purchaser's option if the vendor bids without reserving the right to bid. Sect. 5.

A condition that the purchaser should pay a deposit of 25% per cent. and sign the contract, "and in default of compliance with either of these terms the vendors, or auctioneers on their behalf, shall be at liberty, either thereupon or within fourteen days thereafter, to declare the purchase void; and, if thereupon, that they shall be at liberty, but not obliged, to put up the property again at or as from the bidding immediately preceding," was considered to bind the vendor, in the event, which happened, of the highest bidder's default, to take the next highest bidding as a reserve price, at any rate at that sale. The vendor put up the property again at the second highest bidding; but that bidder and others having refused to abide by their former offers, the property was put up at a lower figure and sold at less than the original second highest bidding. The validity of the sale Special condition as to resale.

was considered doubtful: *Roberts v. Bozon*, 3 L. J. Ch. 113. This construction may be doubted; the condition is a very unusual one and may never occur again. Perhaps the Court was influenced by the fact that the vendor was a trustee.

Purchaser's
misconduct.

The purchaser's own misconduct does not debar him of his right to resist specific performance on account of the vendor's unauthorized employment of a puffer: *Rez v. Marsh*, 3 Y. & J. 331, where the purchaser had bid without intending to complete, but for the purpose of obtaining an abstract of title, in order to aid the tenant of the property who claimed to be entitled thereto. The purchaser in such a case is not invoking the assistance of the Court, and so there is no necessity for him to have "clean hands."

Puffing by
stranger.

The purchaser has no remedy against the vendor where, in consequence of the fictitious biddings of a stranger not authorized to bid on the vendor's behalf, the price has been run up against the purchaser: *Union Bank v. Munster*, 37 Ch. D. 51. On a sale by mortgagees under the direction of the Court in a foreclosure action, the mortgagor, unless authorized by the mortgagees to bid, is a stranger to them, and they are not responsible for his acts: *Ibid.*

CONDITION AS TO RETRACTING BIDDING.

Retracting
bids.

In the absence of stipulation, any bidding may be retracted before the hammer is down: *Payne v. Cave*, 3 T. R. 148; and *Routledge v. Grant*, 4 Bing. 653, 660.

After the hammer is down the auctioneer becomes the agent of the highest bidder for the purpose of signing the contract; and the highest bidder cannot determine this agency by telling the auctioneer not to sign: see p. 376.

Condition
not binding.

The condition against retracting biddings before the hammer is down cannot be enforced: see *Jones v. Nanney*, 13 Pri. 99. Except against a joint vendor or a person concurring in the sale, who bids at the sale by himself or his agent: see *Freer v. Rimmer*, 14 Sim. 391, where on a sale by the Court, with mortgagee's concurrence, the mortgagee's solicitor employed by him to bid was not allowed to retract a bidding.

CHAPTER XXIV.

THE PAYMENT OF THE DEPOSIT.

IF the conditions of sale do not state who is to receive the deposit, the auctioneer has an implied authority to receive it, though he has no implied authority to receive the residue of the purchase-money: see *Sykes v. Giles*, 5 M. & W. 645.

If the conditions do not state who is to receive the deposit, or merely state that the deposit is to be paid to the auctioneer without saying that he is to hold it as agent for the vendor, the auctioneer receives the deposit as stakeholder, and must retain it until the contract is rescinded or completed: *Harrington v. Hoggart*, 1 B. & Ad. 577.

The fact that the auctioneer is also the vendor's solicitor does not of itself constitute him the vendor's agent for the purposes of the deposit: *Edwards v. Hodding*, 5 Taunt. 815.

And even if the deposit is to be paid to the vendor's solicitor, he is still only a stakeholder, unless he is described as "agent for the vendor": *Wiggins v. Lord*, 4 Beav. 30.

When, however, the deposit is paid to the vendor's solicitor or any other person as "agent for the vendor," he holds then as agent for the vendor and not as stakeholder: *Edgell v. Day*, L. R. 1 C. P. 80.

On a sale other than a sale under an order of the Court, the auctioneer has no implied authority to hand over the deposit to the vendor's solicitor, and if he does so and the deposit is thereby lost, the auctioneer will be personally liable: *semble*, *Brown v. Farebrother*, 58 L. J. Ch. 3. But on a sale under the direction of the Court (*Biggs v. Bree*, 51 L. J. Ch. 263), or out of Court where the purchase-money has to be paid into Court (*Brown v. Farebrother*, *ubi sup.*), he is entitled to hand it over to the solicitor for the purpose of its being paid into Court.

CHAPTER XXV.

TIMBER AND FIXTURES.

I.—*Timber.*

No condition
as to timber.

IN the absence of stipulation the sale of the land includes the timber growing on it at the time of the sale, and the vendor cannot insist upon the payment of an additional sum for such timber: Sug. 32. Nor is he entitled to cut the timber pending completion, and any timber so cut belongs to the purchaser.

"Timber,"
definition.

The term "timber" in a contract for sale would probably receive the same definition as that given in the case of disputes between a tenant for life and a remainderman. Timber is defined in *Honywood v. Honywood*, 18 Eq. 306, as oak, ash and elm twenty years old and upwards, provided they are not too old to have a reasonable quantity of saleable wood in them, sufficient to make a good post: see Gibbons on Dilapidations, p. 215. By local custom other trees may be "timber," e.g. beech (*Aubrey v. Fisher*, 10 East, 446), birch if 100 years old (Gibbons, p. 214), hornbeam, whitethorn, blackthorn, cherry, chestnut, and walnut (*Duke of Chandos v. Talbot*, 2 P. Wms. 601, at p. 606), perhaps even pollards (Dart, 149). Also, by local custom, a different test may be adopted of the period when a tree becomes timber, either a later age, or girth instead of age, but not a less age than twenty years: *Foster v. Leonard*, Cro. Eliz. 1.

Copyholds.

A condition that the timber shall be paid for may be enforced, even if the vendor cannot give the purchaser the right to cut the timber, as where the land was copyhold (*Crosse v. Keene*, 9 Ha. 469), or was partly freehold and partly copyhold, but the vendor could not distinguish the boundaries: *Crosse v. Lawrence*,

9 Ha. 462. The possession of the trees is valuable in itself. As a rule where the trees cannot be cut this is a sufficient defect in the title to enable the purchaser to rescind, but if the conditions negative his right to rescind for the defect in the title he cannot escape the payment of the additional price for the timber.

A general condition that the timber shall be paid for at a valuation does not apply where the description in the *particulars* Particulars versus conditions. would lead the purchaser to think that no extra price was to be given for the timber, as, for instance, where on a sale in lots there was a declaration appended to lots 4 and 5 that the timber was to be paid for, which was equivalent to a declaration that the timber on the other lots was not to be paid for: *Higginson v. Clowes*, 15 Ves. 516.

II.—Fixtures.

In the absence of stipulation a sale of a house or other building includes the fixtures, and the vendor cannot require an additional payment for them or remove them pending completion. Fixtures.

“Fixtures” are such things as cannot be removed without doing damage to the freehold: Bacon, C. J., in *Re Armytage*, 14 Ch. D. 379. The older definition, “so affixed to the freehold as not to be removable without considerable force,” is incorrect. “The question is, not whether the thing is easily removable, but whether it is essentially a part of the building itself from which it is proposed to remove it, as in the familiar instance of the grinding stone of a flour mill, which is easily removable, but which is nevertheless a part of the mill itself, and goes to the heir and not to the legal personal representative”: per Romilly, M. R., in *D'Eyncourt v. Gregory*, 3 Eq. 382, at p. 396. Definition.

The distinctions made in favour of tenants do not apply as between a vendor and purchaser, whose rights in this matter would probably be regulated by the law applicable to disputes between the heir-at-law or devisee and the legal personal representative of a deceased landowner.

The following are fixtures:—

Wall-papers or silk used instead of wall-paper: *D'Eyncourt v. Gregory*, 3 Eq. 382 (the case of a dispute between a remainderman under a settlement and a legatee of a tenant for life Wall-papers.

who had built and furnished a new mansion-house in substitution for the old one).

Panelling: *Ibid.*

Paintings. Oil-painting on wood inserted in the brickwork, or tapestry nailed to wood inserted in the brickwork: *Ibid.*

Pictures put up as wainscoat: *Cave v. Cave*, 2 Vern. 508.

Frames filled with white satin, and placed flush with the wall and nailed to it, such frames being a substitute for wall-paper, and therefore part of the wall: *D'Eyncourt v. Gregory*, 3 Eq. 382.

Architectural design. Carved figures and vases, though fixed only by their own weight, are fixtures if they are part of the architectural design, and not mere adventitious ornaments: *Ibid.*

Stone seats and lions on steps, if part of the design of the building: *Ibid.*

Crane. A steam crane cramped on to large stones, and kept in position by two guys: *Re Armytage*, 14 Ch. D. 379 (case under the Bills of Sale Act, 1854).

Rails. Rails and sleepers forming a tramway in a quarry: *Ibid.*

The following are not fixtures:—

Hangings. Hangings and tapestry: *Harvey v. Harvey*, 2 Str. 1141.

Hangings nailed to the wall: *Squier v. Mayer*, 2 Freem. 249.

Paintings. A chimney-glass or oil-painting placed flush with the wall and nailed to it, are not fixtures, because they are mere ornaments: *D'Eyncourt v. Gregory*, 3 Eq. 382.

Looms. Looms in a mill, not fixed but steadied by iron legs let into the floor, are not comprised under the word "fixtures" in a contract for sale (*Hutchinson v. Kay*, 23 Beav. 413), nor are they "machinery belonging to the mill": *Ibid.*

Vats. Vats standing on the ground (*Horn v. Baker*, 9 East, 215), or "standing by their own weight": *Mather v. Fraser*, 2 K. & J. 536, at p. 559.

Granary. A granary resting by its own weight on straddles built into the land: *Willtshear v. Cottrell*, 1 E. & B. 674.

Jibs. Parts of a machine ("jibs") capable of being removed without injury to the rest of the machine or building: *Davis v. Jones*, 2 B. & Ald. 165.

III.—*Valuation.*

It will be proper to consider here the effect of an agreement for a valuation, whether of timber or of fixtures, or of the amount of compensation for an error in the particulars; as it is less usual to insert such an agreement in a condition allowing compensation than it is in a condition requiring the purchaser to pay an additional price for the timber or fixtures. Sometimes the agreement is that the purchaser shall pay a fixed sum for timber and fixtures, but usually the price is to be ascertained by valuation.

In such conditions the question often arises, "Is the agreement for valuation a submission to arbitration?" The question is important for the reason that if there is no submission to arbitration, the Court will not interfere with the valuation made by the valuers or their umpire (see below, p. 186); and if through a hitch in the negotiations no valuation is made, or the valuation is made in a different manner from that stipulated, and therefore is not binding (see pp. 186, 187), the Court will, if there is no submission to arbitration, refuse to enforce the contract of sale, except where the thing to be valued is merely a non-essential adjunct (see p. 187). The agreement to sell at "a fair valuation," without specifying the manner of valuing, would probably be enforced by the Court as being ascertainable like the *arbitrium boni viri* in Roman law. See Dart, 257.

An arbitration is, properly speaking, a judicial inquiry worked out in a judicial manner, the arbitrator hearing the case of each party and deciding upon evidence laid before him. It presupposes the existence at the time the inquiry is held of a dispute or difference between the parties: Common Law Procedure Act, 1854, sect. 11. A mere valuation is an inquiry as to the value of property held for the purpose, not of settling a dispute which has arisen, but of preventing a dispute: per Lord Esher, in *Re Carus-Wilson & Greene*, 18 Q. B. Div. 7.

The following condition is not a submission to arbitration:—
 "Each party shall appoint a valuer and give notice thereof by writing to the other party within fourteen days from the date of the sale. The valuers thus appointed shall, before they

Valuation
clause.

Arbitration.

Conditions
not giving
rise to arbi-
tration.

proceed to act, appoint by writing an umpire, and the two valuers or, if they disagree, their umpire shall make the valuation. Each party shall pay the charges of his own valuer and one-half the charges of the umpire. If either party shall neglect to appoint a valuer or to give notice to the other party within the time aforesaid, the valuer appointed by the other party shall make a valuation alone which shall be binding on the vendor and purchaser:" *Re Carus-Wilson & Greene*, 18 Q. B. Div. 7.

A condition for compensation for misdescription—"such compensation or equivalent to be settled by two referees, one to be appointed by either party or an umpire to be named by the referees before they enter upon the reference, whose decision shall be final"—is not a submission to arbitration: *Bos v. Helsham*, L. R. 2 Ex. 72.

Setting aside valuation.

The Court will not interfere to set aside a valuation if the agreement for valuation was not a submission to arbitration: *Re Carus-Wilson & Greene*, 18 Q. B. Div. 7.

Agreement for valuation ineffectual.

If the agreement for valuation is not a submission to arbitration, the following events may render the agreement ineffectual:—

Refusal to appoint.

1. The refusal of one party to appoint a valuer, will make the agreement ineffectual, unless that contingency is expressly provided for: *Milnes v. Gery*, 14 Ves. 400; *Bos v. Helsham*, L. R. 2 Ex. 72. The Common Law Procedure Act, 1854, s. 13, providing for the appointment of an arbitrator, does not apply to a mere agreement for valuation.

Revoking appointment.

2. The revocation by either party of the appointment of a valuer at any time before a valuation has been made (*Vickers v. Vickers*, 4 Eq. 529), unless the condition expressly provides for such an event.

No umpire appointed.

3. The inability of the valuers to agree upon an umpire (*Collins v. Collins*, 26 Beav. 306), unless this is provided for in the condition.

Variation.

4. The making of the valuation at a different time or in a different manner from that stipulated: *Cooth v. Jackson*, 6 Ves. 12.

Other cases.

5. If the valuation is to be made in one of two ways as the

vendor shall choose, the death of the vendor before choosing makes the agreement for the valuation ineffectual: *Morgan v. Milman*, 3 D. M. & G. 24.

6. A valuation which leaves the price uncertain is ineffectual. In *Hopcroft v. Hickman*, 2 S. & St. 130, the valuation declared the quantity of the land and the price, but provided that if there should be any error in the quantity, an allowance or deduction should be made at the rate of 42*l.* per acre if the mistake were in one part of the property, and at the rate of 82*l.* per acre if in the other part, and the valuation did not state what was the estimated quantity in each part; specific performance was refused on the ground of the valuation being uncertain.

The cases in which the Court will not enforce the contract of sale because no valuation, or only an ineffectual valuation, has been made, are those where the price of the whole property is to be ascertained by valuation (which, being always private sales, are beyond the scope of this treatise), and those where the price of an essential part of the property is to be so ascertained.

If the sale of the fixtures, timber, &c. is under the circumstances non-essential to the fulfilment of the contract to sell the land, specific performance will not be refused on the mere ground that no valuation has been made, and that the price of the fixtures, timber, &c. has not been ascertained: see *Richardson v. Smith*, 5 Ch. 648, at p. 652. There the land was sold for 24,000*l.*, and furniture was to be taken at a valuation; no valuation was made, but the contract for the sale of the land was specifically performed, the furniture, which was worth 2,000*l.*, being regarded as a non-essential adjunct.

A definition of the word "essential" is given at p. 102; the same principle applies to adjuncts of this sort as to cases where the whole property is sold at a fixed price, and part of the property sold is not in existence, or the vendor has no title to it: see *Richardson v. Smith*, 5 Ch. at pp. 652, 654.

The following illustrations of what are essential adjuncts may, perhaps, more conveniently be placed here:—

On the sale of a bleaching field for 7,770*l.*, the plant and machinery, which were to be taken at a valuation, were regarded as non-essential adjuncts or "subordinate appendages," and the

Whole property to be valued.

Valuation of non-essentials.

Illustrations.

non-valuation thereof was held not to be a bar to the specific performance of the contract to sell the land: *Jackson v. Jackson*, 1 Sm. & G. 184.

On the sale of a public-house, the tenant's fixtures and furniture may be non-essential: *Smith v. Peters*, 20 Eq. 511, where Jessel, M. R., said there was "no evidence that the value of the fixtures and furniture was so large as to be an essential portion of the contract." But in *Darbey v. Whitaker*, 4 Drew. 134, where no distinction was drawn between a non-essential and an essential adjunct, the fact that no valuation had been made of the tenant's fixtures, furniture, and stock-in-trade caused the Court to refuse specific performance of a contract for the sale of a public-house. Generally, on the sale of a public-house as a going concern, the fixtures would seem to be an essential adjunct.

Obstructing
valuation.

Either party physically obstructing the valuers and so preventing the valuation from being made, may be ordered by the Court to allow the valuation to be made. In the cases reported, it has been the vendor, who, being in possession of the property, has obstructed the valuers, but the same rule would no doubt apply to any purchaser who put any physical obstacle in the way of the valuation.

In *Morse v. Merest*, 6 Madd. 26, where the vendor refused to permit the valuers to come upon the land, Leach, V.-C., decreed that the vendor should permit the valuation to be made according to the contract, adding that if the valuation were so made, the purchaser must file a supplemental bill for a specific performance upon the terms of the valuation.

Injunction.

Even where the valuation was of a non-essential adjunct and therefore not necessary to enable the purchaser to obtain specific performance of the main contract, the Court made a mandatory order on an interlocutory motion to compel the vendor to allow the valuation to be made: *Smith v. Peters*, 20 Eq. 511.

The fact that one of the valuers refused to go on because he was told by the purchaser that he did not mean to complete, is not an interference with the valuation, such as the Court would restrain by injunction: see *Darbey v. Whitaker*, 4 Drew. 134, at p. 141.

CHAPTER XXVI.

CONDITIONS AS TO TITLE.

PART I. *Generally.*II. *Doubtful title.*III. *Purchaser's knowledge.*PART IV. *Conditions as to title generally.*V. *Conditions as to special matters.*

PART I.—GENERALLY.

EVEN apart from express agreement the vendor is bound to Title. show a good title according to the description in the particulars, and to make out a proper abstract of his title and deliver it to the purchaser, and to verify the abstract by proper evidence, except so far as he is relieved of this duty: (i.) by the fact that the purchaser knew, or had notice before the contract, that he could not get a good title; (ii.) by conditions of sale or the statutory provisions limiting the purchaser's right to call for the title and demand evidence.

The right of the purchaser to have a good title is rested by Lord St. Leonards on an implied agreement in the contract for sale: see Sug. p. 16. Sir William Grant regarded it as a collateral right given by the law: *Ogilvie v. Foljambe*, 3 Mer. at p. 64. See, too, *Ellis v. Rogers*, 29 Ch. Div. 661, at p. 670.

On a sale in lots, if one man buys two adjoining lots which would more conveniently be occupied together (*e.g.*, a house and a meadow), he is not obliged to complete the purchase of either unless the vendor can show a good title to both: *Gibson v. Spurrier*, Pea. Add. Ca. 49.

An analysis of the cases in which the vendor's title has been held to be bad, belongs rather to the general law of real property, and is beyond the scope of this book. But a few words must be said as to the application of the rule that the vendor is

bound to make a good title to cases where the vendor does not purport to sell the fee, and the important question whether a doubt as to the title must be solved by the Court or the title pronounced doubtful, will have to be considered at length. See p. 191.

What sort of title is implied.

A contract for the sale of land implies that the vendor is entitled in fee simple free from incumbrances, unless it is otherwise expressly stated: *Hughes v. Parker*, 8 M. & W. 244. And an agreement to sell *simpliciter* implies a sale of all the vendor's interest: *Bower v. Cooper*, 2 Hare, 408. Rights necessary to the title or to the due enjoyment of the property are also implied. Thus, on a sale of ground rents, a purchaser is entitled to expect a power of distress and entry: *Langford v. Selmes*, 3 K. & Jo. 220.

So a sale of land implies a right of way to reach the land, and a sale of "arable land" implies a right of cart-way or carriage-way; accordingly, in *Denne v. Light*, 8 D. M. & G. 774, the Court refused to decree specific performance of a contract to purchase a field described as "arable land," because the vendor was unable to prove a right of access. But in a suit for specific performance by the purchaser the Court will not, under the inquiry as to title, require the vendor to prove a right of way to the property where there is no contract for a right of way, because this is not a matter of title. See *Curling v. Austin*, 2 Dr. & Sm. 129, where the property sold was a coach-house and stables which had existed for forty years, and there was apparently a right of way.

The description of a house as "now in the occupation of C. under a lease for twenty-one years from Lady Day, 1847," was held to include not merely so much of the house as C. was occupying, but the whole of the premises demised by the lease, and therefore to include a cellar under the house which, at the time of the sale, was in the occupation of the lessor (who was also the owner of the adjoining house), but at the time of the demise was not known to exist: *Whittington v. Corder*, 16 Jur. 1034.

Sale of lease.

On a contract for the sale of a subsisting lease, the purchaser cannot be compelled to accept a new lease as original lessee,

because his liability under the lease would be greater than that under the assignment: *Mason v. Corder*, 2 Marsh. 332.

A contract to sell a lease cannot be satisfied by selling a *voidable* lease: *Penniall v. Hurborne*, 11 Q. B. 363. And a contract to grant a lease implies a contract to grant a *valid* lease: *Shanks v. St. John*, L. R. 2 C. P. 376. So on a contract to sell an agreement to lease, the vendor is bound to show that he has a title to a *valid* agreement. If the vendor has a mere voidable agreement, the purchaser is entitled to repudiate the contract: *Brewer v. Broadwood*, 22 Ch. D. 105.

On the sale of a lease containing a covenant to build additional houses and deliver them up at the end of the term, the title to the lease is bad if the houses are not built, even though the covenant to build has been waived, and the covenant to deliver up might be escaped by assigning to a pauper before the termination of the lease: *Nouaille v. Flight*, 7 Beav. 521.

PART II.—DOUBTFUL TITLE.

The title of the vendor must not only be good in the opinion of the judge who decides the dispute between the vendor and the purchaser, it must be one which is free from reasonable doubt: *Pyrke v. Waddingham*, 10 Ha. 1. This rule is at least as old as Sir Joseph Jekyll's time. See remarks of Grant, M. R., in *Sloper v. Fish*, 2 V. & B. at p. 149, referring to *Marlow v. Smith*, 2 P. W. 198.

The history of the fluctuation of decision need not be here entered into, but the arguments for and against the rule may be briefly stated. The argument for the rule is, that a decision in favour of the vendor "does not technically bind any one else but the parties actually before the Court, and does not prevent any person not bound by the decision from at any time bringing fresh litigation upon the purchaser with reference to the same title": per Jessel, M. R., in *Osborne to Rowlett*, 13 Ch. D. 774. Even a decision of the House of Lords in favour of the vendor would not be decisive, though such a decision "would give a sanction to the title which would probably operate to the

Doubtful title.

Reasons for rule in *Pyrke v. Waddingham*.

security of the purchaser": *Jerroise v. Duke of Northumberland*, 1 J. & W. 559, at p. 569. See *Blosse v. Lord Clanmorris*, 3 Bli. 62, 71.

Arguments
against the
rule.

The argument against the rule is stated with much force by Lord Eldon in *Vancouver v. Bliss*, 11 Ves. at p. 465: "It is scarcely possible to represent the difficulties that have arisen from this rule; especially in a period when persons, under the description of land jobbers, are going about looking for these things; and persons improvidently enter into contracts with them. Whenever a contract is made for the purchase of land, though no doubt has ever been entertained upon the title, no one thinking of disputing it, if the purchaser has a good bargain, he overlooks all these objections. But if he finds he cannot sell the estate as well as he wished, or cannot enjoy it to his satisfaction, the first thing is that the abstract goes to some one for the express purpose of finding out objections, and opinions are given on both sides. I feel great concern for the owners of this sort of property. The consequence is not only the misery arising from the uncertainty whether that which they have been enjoying with happiness, and upon which their families are to subsist, is their property, but it is an invitation to all who may fancy they have an interest in it to make an attack."

Attempted
definitions of
doubtful title.

The question what is a "doubtful" title, is one of great difficulty. The following expressions occur in the decided cases:—

"A considerable, a rational doubt": per Lord Eldon in *Stapylton v. Scott*, 16 Ves. 272; and "grave and reasonable doubt": *Earl of Lincoln v. Arcedeckne*, 1 Coll. 98; opposed to "a mere possibility of doubt": *Burke v. Annis*, 11 Ha. 232.

The test applied in *Mullings v. Trinder*, 10 Eq. 449, was, "Would a sensible man differ from the conclusion to which the judge has come?" In *Pyrke v. Waddingham*, 10 Ha. 1, one test was, "Is the title one that other competent persons would think to be good?" "Free from all reasonable objection" is the phrase used in *Spurrier v. Hancock*, 4 Ves. at p. 672. In *Rogers v. Waterhouse*, 4 Drew. 329, the test was, "Can I say that I have so clear an opinion as to think that no other judge could take a different view?" In *Burnell v. Firth*, 15 W. R.

546, the doubt was on "a point of much nicety on which opposite judgments might be expected from different judges."

In many cases the probability of litigation has been made the test. In *Cattell v. Corral*, 4 Y. & C. 228, at p. 237, the words are "a reasonable, decent probability of litigation." "The Court cannot force on anybody a title which it is evident will involve the taker in immediate litigation": *Pegler v. White*, 10 Jur. N. S. 330. The Court will not enforce the contract "where the rectitude of the title depends upon facts which very probably will be disputed, and are certainly capable of being disputed": *Nottingham, &c. v. Butler*, 16 Q. B. Div. 787. On the other hand, a "shadowy and frivolous claim" will not make the title doubtful: *Heseltine v. Simmons*, 6 W. R. 268. So, a mere claim not followed up by any act, and without any fact stated as a foundation for it, is not sufficient to make the title doubtful (*Green v. Pulsford*, 2 Beav. 70), especially if the purchaser has accepted the title: *Harry v. Davey*, 2 Ch. D. 721. The existence of a *lis pendens* does not make the title doubtful: *Bull v. Hutchens*, 32 Beav. 615. The title was forced on the purchaser where "there was nothing more than a notice that the heir meant to dispute the will" (on the validity of which the title depended), "and that he meant to dispute it on grounds as to which it was impossible, from an inspection of the will, for the Court to come to any judgment impeaching its validity": *Grove v. Bastard*, 1 De G. M. & G. 69. In *Osbaldiston v. Asker*, 2 J. & W. 539, the Court allowed the Master's report on a reference of title to proceed, notwithstanding pending litigation against the vendor in respect of part of the property sold. But *Pegler v. White*, see above, seems opposed to such procedure. In cases where there is a probability of adverse rights existing, the fact that there is little probability of the adverse rights being exercised, has sometimes been held sufficient to enable the Court to force the title on the purchaser. See an anonymous case in Sug. 393, and also *Lyddall v. Weston*, 2 Atk. 19. But these cases are extremely doubtful, and would probably not be followed, and the principle governing them, viz., that "it is impossible, in the nature of things, that there should be a mathematical certainty of a good title" (see 2 Atk. p. 20), has

been explained as meaning merely "that you cannot prove a title by means of reasoning, but only with the help of evidence": per Alderson, B., in *Hutchinson v. Morritt*, 3 Y. & C. at p. 554.

The test "is the title marketable?" is sometimes applied. Thus, in *Stapylton v. Scott*, 16 Ves. 272, it was considered that the purchaser was entitled to "a reasonably clear marketable title, without that doubt as to the evidence of it which must always create difficulty in parting with it." But this is really no test at all, because a marketable title is itself defined as one "which may, at all times, and under all circumstances, be forced upon an unwilling purchaser": *Pyrke v. Waddingham*, 10 Ha. 1, at p. 8. In *Moulton v. Edmonds*, 1 D. F. & J. 246, the words used were "a marketable title, capable of strict proof, enabling him easily to resell whenever he may have a mind so to do." In *Lowes v. Lush*, 14 Ves. 547, it was said that the purchaser was entitled to "an available title, not merely a marketable title, but one which he can take with reasonable safety."

The test "Can the Court warrant the title to the purchaser?" was used in *Heath v. Heath*, 1 Bro. C. C. 147, and in *Lowes v. Lush*, 14 Ves. 547, at p. 550. And again, "Would the Court trust its own money on the title?": per Lord Eldon, in *Jerroise v. Duke of Northumberland*, 1 J. & W. 559.

None of these tests appear satisfactory. It will be more profitable to examine the cases of doubtful title under separate heads, distinguishing cases where the facts are doubtful from cases where the law is doubtful.

I. *Facts doubtful.*

Facts
doubtful.

If the vendor has no evidence or no sufficient evidence of facts which he is bound to prove, the title is doubtful, and will not be forced on an unwilling purchaser.

See below, p. 195, as to what facts a vendor is bound to prove.

Facts in-
capable of
proof.

Sometimes, the vendor cannot make out a good title because he has to prove a fact which, from the nature of the case, is incapable of being satisfactorily proved. Thus, where the vendor had to prove that he had no creditor who could take advantage of an act of bankruptcy which he had committed, this was a fact which the vendor could not prove satisfactorily

because his own testimony was insufficient, and any inquiry directed by the Court as to creditors would be unavailing as the creditors would not be bound by it: *Lowes v. Lush*, 14 Ves. 547. "The matter of fact upon which a title depends, may be such as not in its nature to be capable of satisfactory proof, as in the case of *Lowes v. Lush*, and such a title a purchaser cannot be compelled to take; or the fact may, in its nature, be capable of satisfactory proof and yet not satisfactorily proved": per Leach, V.-C., in *Smith v. Death*, 5 Madd. 371. In that case, the vendor was held to have satisfactorily proved that a person under whom he claimed, answered the description "who should be brought up and educated as a member of the established Church of England and should be a constant frequenter of such church." Where the vendor is called upon to prove a negative, the title is doubtful because it is impossible satisfactorily to prove a negative. Thus, where the safety of the title depends on the question whether the vendor had notice of a prior registered judgment, the vendor's evidence and that of his agents that he had no notice is insufficient, and the title is doubtful: *Freer v. Hesse*, 4 De G. M. & G. 495. So, too, a title depending on the question whether a previous purchaser bought without notice of restrictive covenants is a doubtful title: *Nottingham, &c. v. Butler*, 16 Q. B. Div. 778. The Court may be satisfied, on the evidence before it, that the prior purchaser had no notice, but subsequent litigation may bring fresh evidence to light: *Ibid.*, per Lindley, L. J.

A further source of doubt is pointed out by Leach, V.-C., in *Emery v. Grocock*, 6 Madd. 54: "There may be doubt, even if the vendor adduces direct evidence of a fact upon which his title rests, because such evidence may be given *malâ fide*, or if given *bonâ fide* it may be mistaken." But in such a case either the evidence is disbelieved by the Court, in which case the fact is not proved, or else the Court considers that additional evidence is necessary, which merely amounts to a case of insufficient proof" (see above).

The vendor is bound to prove all the facts on which his title rests, except so far as he is relieved by any presumption of fact

What facts
must be
proved.

made by the Court, or by the express or statutory conditions of sale.

Conditions. As to conditions of sale relieving the vendor from the duty of proving his title, see pp. 211 to 225.

**Presump-
tions.** A presumption of fact made by the Court must be distinguished from a mere inference; it is a presumption of such a nature that it would be the duty of the judge, if sitting before a jury, to give a clear direction in favour of the fact: per Leach, V.-C.,

Inferences. in *Emery v. Grocock*, 6 Madd. 54. A mere inference, or a presumption of such a nature that "it would be the duty of a judge to leave it to the jury to pronounce upon the effect of the evidence," does not relieve the vendor from the duty of proving the fact, and a title depending on such a presumption would be considered doubtful: *Ibid*.

Some doubt is thrown on the learned Vice-Chancellor's rule as to presumptions in *Magennis v. Fallon*, 2 Moll. 561, at p. 579; but in *Fry on Specific Performance*, p. 391, the proposition is stated without any qualification.

**Examples of
presumptions.** It is beyond the scope of this treatise to enumerate all the presumptions of fact which the Court will make in regard to matters upon which the vendor's title may depend. The following are a few instances of presumptions which have been made:—

The identity of persons named in the title deeds is presumed from the identity of names. See a Canadian case, *Nicholson v. Burkholder*, 21 U. C. R. 108.

Where deeds recited in a document of title have been lost, it is presumed from the fact of their having been recited, that they contain nothing adverse to the title: *Prosser v. Watts*, 6 Madd. 59.

Where the purchaser objected to the title on the ground that the Crown was entitled to the mines under the land, the Court presumed the non-existence of mines from the fact that no search had been made for upwards of a century; and the reservation of mining rights being no objection to the title if it is proved that there are no mines, the Court forced the title on the purchaser: *Lyddal v. Weston*, 2 Atk. 19.

**Extrinsic
facts.**

But there is a large and important class of presumptions

which requires a more detailed examination, viz., presumptions as to extrinsic facts. As to this class of facts the law is not perhaps well settled, and the following rule may be worded in too sweeping a manner, but the tendency is in the direction of such a rule.

The Court presumes the non-existence of facts adverse to the title, unless there is some indication on the abstract of the existence of such facts, or some other evidence giving rise to a suspicion of their existence. General negative presumption.

The general negative presumption just stated must exist, otherwise a vendor would be put to the proof of a host of facts (many of them incapable of satisfactory proof), simply because they may possibly exist, and if they do the title will be bad.

Thus, the mere fact that it is possible for the vendor to have forfeited his interest under a forfeiture clause, there being no special reason for suspecting that any forfeiture has occurred, does not put the vendor to proof of there having been no forfeiture: *Maling v. Hill*, 1 Cox, 186.

Where the vendor's title depends on the invalidity of a prior voluntary conveyance, it would seem (but *qu.?*) that the Court, in the absence of suspicion, presumes that no subsequent consideration has made the voluntary settlement good. See *Butterfield v. Heath*, 15 Beav. 408, at p. 414, disapproved on another point in *Re Foster and Lister*, 6 Ch. D. 87.

If the doubt is caused by an indication in the abstract itself of the existence of a fact adverse to the title, the vendor must adduce evidence to disprove the adverse fact. Suspicion.

Thus, where the title to the property, the entirety of which the vendor contracted to sell, depended on a devise of the testator's "undivided moiety," &c., and "all his other shares, proportions, and interest, if any, in the premises," the title was held to be doubtful: *Stapylton v. Scott*, 16 Ves. 272.

In the case of a title depending on the validity of a purchase by a solicitor from his client (*Spencer v. Topham*, 22 Beav. 573), or a father from his son (*Boswell v. Mendham*, 6 Madd. 373), evidence of the fairness of the transaction must be produced, because in such cases the facts appearing on the abstract are suspicious on the face of them.

Where the vendor, to facilitate the sale, made an assignment,

which being an assignment of the whole of his property amounted to an act of bankruptcy, it was held that the vendor was bound to prove that he had no creditor who could take proceedings in bankruptcy against him, and as it was impossible to prove this negative the title was held to be doubtful: *Louces v. Lush*, 14 Ves. 547.

Presumption
of *bona fides*.

The presumption of *bona fides* is one of the most important presumptions comprised in the rule as to the presumption of the non-existence of facts adverse to the title (p. 197). It has not indeed always been held that a transaction must be assumed to be *bona fide* in the absence of any circumstances raising doubt or suspicion. Thus, in *Hartley v. Smith*, Buck, 368, the possibility of the existence of facts (not appearing on the abstract or known to the purchaser) which would render a deed under which the vendor claimed invalid on the ground of *mala fides*, was considered a sufficient reason for holding the title doubtful. But this case is doubted by Lord Justice Fry (Sp. Perf. p. 392), and does not seem to have been followed. In *Cattell v. Corral*, 4 Y. & C. 228, the vendor was held not bound to prove that a conveyance by him for the benefit of his creditors was not invalid as being a conveyance of all his property, or as being intended to favour one creditor more than another, or as being made in contemplation of bankruptcy, there being no indication of any such facts on the abstract. There is some difficulty in deciding in each case whether the facts do or do not raise a suspicion of *mala fides*; some judges have gone very far in refusing to treat the facts as raising suspicion. In *Alexander v. Mills*, 6 Ch. App. 124, the fact that recently appointed trustees for sale sold the reversion to a person who had already bought the life estate in the same property, and that on a sale by auction eighteen months afterwards, a profit of 2,000*l.* on 19,000*l.* was made, was not considered as raising a suspicion of *mala fides*. Where the property was settled to the use of A. for life, remainder to the use of A.'s wife for life, remainder to the use of such one or more of their children as A. should appoint, and A. having six children appointed the whole to his eldest son and then sold the property, the conveyance to the purchaser purporting to be made in consideration of 8,000*l.* paid to A., A.'s wife, and the eldest son, the Court presumed that the

purchase-money was properly divided between them according to the interests they had in the estate, and that the appointment was not fraudulent: *M'Queen v Farquhar*, 11 Ves. 467. In a similar case where the property was settled in the same way, and A. having seven children appointed the whole to the eldest daughter and then mortgaged for a sum expressed to be paid to him, his wife, and the eldest daughter, the Court presumed the *bona fides* of the appointment and mortgage, and held that the purchaser was bound to complete notwithstanding a notice by the younger children (alleging, however, no further facts) that the appointment was fraudulent: *Green v. Pulsford*, 2 Beav. 70. Even where there had been previous fraudulent appointments under the same power, this did not raise the suspicion of fraud: *Carrer v. Richards*, 1 D. F. & J. 548. The presumption of *bona fides* is strengthened by lapse of time: *Re Postlethwaite*, 37 W. R. 200.

The title was held to be bad or doubtful where it depended on the validity of an appointment by a father to his daughter aged twenty-one, who immediately mortgaged the sum appointed and went out to the Cape with her father and the rest of the family, the mortgage money going to pay not only for her outfit and passage money, but for that of the whole family also: *Warde v. Dixon*, 28 L. J. Ch. 315. In that case it was said that there was not merely suspicion as in *M'Queen v. Farquhar*, but "grave doubt" or "presumptive proof" that some of the money went into the father's pocket. Validity of appointment doubtful.

The Court will not presume that a predecessor in title of the vendor bought without notice of an incumbrance: *Freer v. Hesse*, 4 D. M. & G. 495. Notice.

II. *Law doubtful.*

The disputed point of law may be either a point covered by decision or not. Law doubtful.

In the case of a point covered by decision (1) the prior decision may be adverse to the title, and the judge deciding whether the title is marketable may think that decision wrong; (2) the prior decision may be favourable to the title, and the judge may think that decision wrong; or (3) there may be prior conflicting decisions on the point. Point covered by decision.

1. *Prior Decision adverse to the Title.*

Prior decision
adverse.

An adverse decision of a Court of co-ordinate jurisdiction upon the same or a similar point makes the title doubtful (*sed qu.*); but a decision of an inferior Court does not.

Court of
co-ordinate
jurisdiction.

The law is not well settled as to the effect of an adverse decision of a Court of co-ordinate jurisdiction. The rule is thus stated by Lord Romilly, M. R., in *Mullings v. Trinder*, 10 Eq. 449, "Where there has been a decision adverse to the title or to the principle on which the title depends, which the Court is of opinion is wrong (of course, if the Court is of opinion that the decision is right, it is simply a bad title), the Court will not rely upon its own opinion against a decision already pronounced, and will not enforce the title." But this statement of principle is only *obiter dictum*, the actual decision being that a title is not rendered doubtful merely because a Court of co-ordinate jurisdiction, which itself considered the title in question or a similar title to be good, refused to force it on a purchaser. In *Fry on Spec. Perf.* p. 388, the rule as laid down in *Mullings v. Trinder* is given without query. The rule was observed in *Rose v. Calland*, 5 Ves. 186, and by Jessel, M. R., in *Collier v. Walters*, see 17 Eq. at p. 260, until the Lords Justices gave him leave to consider the case as if he were not bound by the prior adverse decision.

In the following cases, however, the rule was not followed: *Russell v. Plaice*, 18 Beav. 21; *White and Hindle's Contract*, 7 Ch. D. 201 (where, however, the purchaser's counsel did not argue that the title was *doubtful*); *Osborne to Rowlett*, 13 Ch. D. 774.

In *Osborne to Rowlett*, although there had been a decision on a similar point (*Cooke v. Craufurd*) which was adverse to the title, Jessel, M. R., decided that the title was good, on the ground that the adverse decision had been questioned in succeeding cases. It is instructive to observe that in *Morton and Hallett*, 15 Ch. Div. 143, the Court of Appeal doubted whether Jessel, M. R., was right in declining to follow *Cooke v. Craufurd*. This seems to show that after all the title was doubtful, and that the safer rule is to declare the title doubtful in all cases where there has been an adverse decision of a Court of co-ordinate

jurisdiction. It is, however, only fair to add that in another case (*Collier v. Walters*, see 17 Eq. at pp. 260, 261) Jessel, M. R., at first held a title doubtful because of a prior adverse decision, although clearly of opinion that such decision was wrong, and then when the Lords Justices allowed him to hear and decide the case unfettered by authority, the counsel for the purchaser both declined to argue in support of the decision, abandoning it as untenable.

If the decision of the Court of co-ordinate jurisdiction is merely that the title, or a similar title, is doubtful, the judge himself thinking it good but declining to force it on an unwilling purchaser, this is not a decision adverse to the title within the meaning of the above rule. In *Mullings v. Trinder*, 10 Eq. 449, Lord Romilly, M. R., compelled a purchaser to take a title which Turner, L. J., in *Pyrke v. Waddingham*, 10 Ha. 1, had refused to force on a purchaser, though he himself thought the title good. "If," adds Lord Romilly, "Lord Justice Turner had expressed an opinion unfavourable to the title, however much that might have surprised me, I should have considered it a case too doubtful to enforce specific performance against the purchaser." In such a case the title cannot really be said to be doubtful, because upon the two last occasions in which it has been discussed in Court, the opinions of the judges have been that the title is good.

Title held doubtful by court of co-ordinate jurisdiction.

An adverse decision of an inferior Court is not sufficient in itself to make the title doubtful. In *Sheppard v. Doolan*, 3 Dru. & War. 1, Lord St. Leonards says: "With respect to the common cases of doubtful title, I cannot agree with the proposition that an unfavourable decision in the Court of inferior jurisdiction renders the title doubtful. The judge of the superior Court would still be bound to exercise his own discretion and decide according to his own judgment. I have myself often argued at the bar in support of the proposition, but always without success; for although I have urged that no judge could consider a title to be free from doubt when one or two judges competent to decide the question had pronounced it to be defective, I have ever been met by this answer, that to adopt such a doctrine would be in effect to leave the ultimate decision of the

Inferior Court.

question to the Court below, while the law provides an appeal to the Court above."

Turner, L. J., in *Cook v. Dawson*, 3 De G. F. & J. 127, does not in any way dissent from this proposition when he says, that if the judge of the Court below has pronounced the title to be bad, the Court of Appeal will not force the title on the purchaser unless the case is "clear to demonstration." There is a dictum of Wood, V.-C., in *Hamilton v. Buckmaster*, 3 Eq. 323, at p. 328, that "the Court of Appeal has always held that the simple expression of doubt in the Court below is sufficient to prevent the title from being forced upon a purchaser"; and there is a decision of the Court of Appeal (*Collier v. McBean*, 1 Ch. 81) refusing to force a title on a purchaser because the judge appealed from decided it was bad; but these must now be considered to be overruled by *Beioley v. Carter*, L. R. 4 Ch. 230, and *Alexander v. Mills*, L. R. 6 Ch. 124: per Jessel, M. R., in *Collier v. Walters*, 17 Eq. 252, at p. 260. *Radford v. Willis*, 12 Eq. 105; 7 Ch. 7, is another instance of a decision of the Court of Appeal that the title is good, although the judge in the Court below thought it bad or doubtful.

2. Prior Decision favourable to the Title.

Prior decision
favourable.

(i.) A prior favourable decision of a Court of co-ordinate jurisdiction on the same or a similar point will not make the title good if the judge thinks that decision wrong: *Mullings v. Trinder*, 10 Eq. 449.

(ii.) If there has been a prior favourable decision which the judge thinks right, the title is good, not doubtful (*sed qu.*).

The second of the above propositions appears to be involved in the principle laid down in *Alexander v. Mills*, 6 Ch. App. 124 (see below), which case, however, is much shaken by the remarks of Lord Selborne in *Palmer v. Locke*, 18 Ch. Div. 381. The exception in *Alexander v. Mills*, of points of construction of particular ill-drawn instruments (a case in which it is not likely that there would be a prior decision, as no two ill-drawn documents are alike), is an exception which need not be made in rule 2 (ii), as the prior favourable decision, coupled with the opinion of the judge that that decision is right, would, it is sub-

mitted, make the title free from doubt. Further doubt is thrown on the correctness of the second of the above propositions by the remarks of Turner, V.-C., in *Collard v. Sampson*, 4 D. M. & G. 226. The learned judge there doubted "whether a point of this nature," the construction of a general Act of Parliament, "can for such a purpose as we have here to deal with, be considered to be settled by a single decision; and at all events, I think that the Court before it could, as against a purchaser, hold the point to be settled by a single decision, must be satisfied that the decision rests upon grounds open to no doubt or question."

3. *Prior Decisions conflicting.*

If there are prior decisions of co-ordinate authority, which are conflicting, the title would seem to be doubtful, unless (*qu.*?) the more modern authority is favourable to the title, and the earlier conflicting decision is generally considered to be wrong. Prior
decisions
conflicting.

In *Palmer v. Locke*, 18 Ch. Div. 381, Lord Selborne says: "When you have a question raised upon the construction of a general statute, if there is any reasonable ground for saying that that question is not determined by previous authorities, or that the previous authorities are conflicting, then, in the terms of Lord Justice Turner's judgment in *Pyrke v. Waddingham*, that cannot be treated as a question of general law so settled as to exclude that kind of question which the Court has paid regard to when it sees there is a doubtful question of title which cannot be forced on a purchaser."

In *Alexander v. Mills*, 6 Ch. 124, the Court of Appeal held a title to be good on the authority of a case in the House of Lords, and two cases before the Master of the Rolls, reversing the Master of the Rolls who had himself held the title to be bad.

Where there are conflicting decisions, the Court looks at "the present state of the authorities." See *Eno v. Eno*, 6 Ha. 171, at p. 177.

Where a prior decision favourable to the title has been doubted by subsequent judges, the title is probably doubtful. See *Cook v. Dawson*, 3 D. F. & J. at p. 130.

4. *Point not covered by decision.*

Point not
covered by
decision.

If the point is one not covered by previous decisions, the mere adverse opinion of a conveyancing counsel does not make it doubtful: *Hamilton v. Buckmaster*, 3 Eq. 323 (but see *Marlow v. Smith*, 2 P. Wms. 198, quoted in *Pyrke v. Waddingham*, 10 Ha. p. 7); nor the opinion of a writer of a text-book: *Wyman v. Carter*, 12 Eq. 309. Nor does the favourable opinion of a counsel of eminence render the point free from doubt. In *Pyrke v. Waddingham*, 10 Ha. 1, the title had been accepted by an equity judge while in practice advising on behalf of mortgagees.

Opinion of
counsel.

Moot point.

If the point is one of known difficulty, or one known to be a moot point amongst conveyancers, the title is doubtful: per Romilly, M. R., in *Mullings v. Trinder*, 10 Eq. at p. 454.

Apart from cases of known difficulty, cases of doubt which have never been the subject of judicial decision may be divided into two classes according to their subject-matter:

(i.) Where the doubt is respecting the existence of an alleged rule of law or equity, or the construction of a public general Act of Parliament.

(ii.) Where the doubt is respecting the construction of some document other than a public general Act of Parliament.

Rule of law.

(i.) *Rule of law or construction of public statute.*

With regard to the first class it may be suggested that it is in the power of the Court to remove the doubt by deciding one way or the other, since a point of general law when once decided is settled law, and it is perfectly immaterial between what parties the question arises, as the decision would be binding on all Courts of co-ordinate or inferior jurisdiction. "As a general and almost universal rule the Court is bound as much between vendor and purchaser, as in every other case, to ascertain and determine, as it best may, what the law is, and to take that to be the law which it has so ascertained and determined. The exceptions to this will probably be found to consist not in pure questions of legal principle, but in cases where the difficulty and the doubt arise in ascertaining the true construction and legal operation of some ill-expressed and inartificial instrument": *Alexander v. Mills*, 6 Ch. at p. 131. The authority of

this case is, however, somewhat shaken by *Palmer v. Locke*, 18 Ch. Div. 381. In *Collard v. Sampson*, 4 D. M. & G. 226, Turner, V.-C., even doubted whether the construction of a general statute could be considered sufficiently settled by a single prior decision, so as to enable the Court to force the title on the purchaser: for a contrary view, see *Bell v. Holtby*, 15 Eq. at p. 193, per Malins, V.-C.

The authorities leave the question extremely doubtful, but on the whole the following rule seems to be gaining ground: the Court will force the purchaser to accept the title if the point alleged to be doubtful is a point of general law not covered by prior decision, or the construction of a public general Act of Parliament not previously determined, and the Court itself is favourable to the title.

A title depending on the power of executors to sell within twenty years for payment of debts, without proving that any debts remain unpaid, was forced on a purchaser, though the period during which executors could sell without such proof had not previously been fixed by law: *Re Tanqueray-Willaume and Landau*, 20 Ch. Div. 465. Examples.

In *Beioley v. Carter*, L. R. 4 Ch. 230, the Court decided in the vendor's favour a point of construction arising on the Leases and Sales of Settled Estates Act.

In *Bell v. Holtby*, 15 Eq. 178, the Court decided in the vendor's favour a point of construction arising on the Fines and Recoveries Act, sect. 32, which had not before been decided, or even discussed by text-writers: *Vide ibid.* pp. 187, 188.

In *Re Cooper and Allen*, 4 Ch. D. 802, Jessel, M. R., decided a point arising on the Succession Duty Act which had not been before decided, although the Crown was not before him, and therefore was not bound by his decision: *Ibid.*, p. 827.

(ii.) *Point of construction.*

A point of construction arising on a well drawn instrument, and involving a question of general law applicable to all similar instruments, will be decided by the Court. If the point of construction arises on some ill-expressed and inartificial instrument, or depends on some special context, the Court will refuse to decide the construction in favour of the vendor, and will declare Point of construction.

the title too doubtful to be forced on the purchaser : *Radford v. Willis*, 7 Ch. 7 ; and *Alexander v. Mills*, 6 Ch. 124.

Private Act. The construction of a private or local Act is governed by the same rule ; if the Act contains an ambiguity not likely to occur in another private Act or document, the Court refuses to force the purchaser to accept a title depending on its construction ; *e.g.*, where an Act empowering trustees to sell, in one part excepted certain land, and in another part included it : *Earl of Lincoln v. Arcedeckne*, 1 Coll. 98 (queried in Dart, 1235, n. (y)).

Examples. The Court has, in accordance with the above rule, decided the following points in favour of the vendor :—

That a right of pre-emption given by a local Act to “the persons of whom the lands were purchased” is limited to the actual vendors of such lands : *Highgate Archway Co. v. Jeakes*, 12 Eq. 9.

The construction of a clause in a will fixing the time within which an option to purchase must be declared : *Austin v. Tawney*, 2 Ch. 143.

The question whether a power of sale implied a power to give valid receipts discharging the purchaser from seeing to the application of the purchase-money : *Balfour v. Welland*, 16 Ves. 151.

On the other hand, the Court refused to decide whether a power of sale to trustees “with the consent in writing of my sons and daughters” could be validly exercised after the death of any of them with the consent of the survivors : *Sykes v. Sheard*, 2 D. J. & S. 6.

The Court considered a title doubtful which depended on the construction of the words “with all right and title to the same” following a gift to A., by a will made before the Wills Act, of various freehold estates and a leasehold estate, which words the vendor argued applied to all the properties, and not merely to that immediately preceding them, so as to give A. the fee in the freeholds : *Sharp v. Adcock*, 4 Russ. 374.

The Court refused to decide the following cases of doubtful construction :—

The question whether the exception of “what is hereinafter mentioned and devised” included leaseholds, there being nothing

else specifically devised in the will: *Sheffield v. Mulgrave*, 2 Ves. jun. 526.

The question whether the words "all my hereditaments in the kingdom of England" included an estate in Wales: *Okeden v. Clifden*, 2 Russ. 309.

If the case is quite free from doubt, the Court will decide the construction of special words in an ill-drawn instrument. Ill-drawn instrument.

The Court decided, in favour of the vendor, that the words "All my worldly estate and effects" in a will included real estate: *Hamilton v. Buckmaster*, 3 Eq. 323; also that the words "And it is my will and request that they" (testator's daughters) "shall not sell or dispose of any part of my said freehold or leasehold premises," were not sufficient to restrain one of such daughters from alienating the property during her coverture: *Re Hutchings to Burt*, 59 L. T. N. S. 490 (Court of Appeal reversing Kay, J.).

If the vendor's title is not considered bad by the judge, but only doubtful, the purchaser will be entitled to resist specific performance, or even to rescind, but will not necessarily be entitled to damages or to a return of his deposit. See as to return of deposit, *Nottingham Case*, 16 Q. B. Div. 787. In *Clarke v. Willott*, L. R. 7 Ex. 313, where a return of the deposit was ordered, the title was not only doubtful as depending on a doubtful state of facts, but bad because the Court held that the vendor, having previously executed a voluntary conveyance, could not compel the purchaser to concur in defeating that conveyance, and until the purchaser accepted a conveyance and gave valuable consideration, the vendor was unable to make a good title. Damages and return of deposit.

PART III.—PURCHASER'S RIGHT TO GOOD TITLE EXCLUDED BY HIS KNOWLEDGE OF THE DEFECT.

In the absence of express agreement as to title, if the purchaser knew or had notice of an irremovable defect in the title, he cannot refuse to complete because of that defect: *Ellis v. Rogers*, 29 Ch. Div. 661. If the contract contains an express agreement by the vendor to give a good title, or to remove the Purchaser's knowledge of defect.

defect, this agreement excludes the effect of the purchaser's knowledge or notice, or, as it is sometimes put, parol evidence of the purchaser's knowledge or notice is inadmissible to contradict the written contract: *Cato v. Thompson*, 9 Q. B. Div. 616.

Removable
defect.

Knowledge of a removable defect will not preclude the purchaser from requiring its removal or objecting to complete if it is not removed. See *Barnett v. Wheeler*, 7 M. & W. 364.

"When the contract is silent as to the title which is to be shown by the vendor, and the purchaser's right to a good title is merely implied by law, that legal implication may be rebutted by showing that the purchaser had notice before the contract that the vendor could not give a good title. If the vendor, before the execution of the contract, said to the purchaser, 'I cannot make out a perfect title to the property,' that notice would repel the purchaser's right to require a good title to be shown. But if the contract expressly provides that a good title shall be shown, then, inasmuch as a notice by the vendor that he could not show a good title would be inconsistent with the contract, such a notice would be unavailing, and whatever notice of a defect in the title might have been given to the purchaser he would still be entitled to insist on a good title": per Fry, J., in *Re Gloag and Miller*, 23 Ch. D. 320, 327.

"The law, as stated in the cases of *Cato v. Thompson* (9 Q. B. D. 616), and *In re Gloag and Miller's Contract* (23 Ch. D. 320), is, that where the contract does not expressly provide that there should be a good title, the knowledge of the purchaser before the contract that there was a defect which the vendor was unable to remove, prevents his raising an objection on that ground. But it is essential that the purchaser should have knowledge not only of the existence of the incumbrance, but of the vendor's inability to remove it": per Kay, J., in *Ellis v. Rogers*, 29 Ch. D. at p. 666.

Where the purchaser, together with the vendor and another person, were entitled to a leasehold colliery, and the vendor agreed to assign his share in the colliery, the purchaser was held to be affected with notice of the lessor's title and precluded from objecting to it: *Phipps v. Child*, 3 Drew. 709.

On a contract for a lease the intending lessee, if he knows

that the lease is in excess of the lessor's power, is not entitled to partial performance: *Laurenson v. Butler*, 1 Sch. & L. 13.

On an open contract which did not specify the vendor's interest, the purchaser, who knew what that interest was, was held unable to object to the title on the ground that the vendor had only a leasehold interest: *Cowley v. Watts*, 17 Jur. 172.

Where the contract fully informs the purchaser that the vendor has not the fee simple, the purchaser will not be entitled to the same relief as if he had no notice of the vendor's title. Thus, where husband and wife agree to sell the wife's interest, the purchaser cannot, in case of the wife's refusal to complete, compel the husband to convey his interest with compensation for the wife's non-concurrence: *Castle v. Wilkinson*, 5 Ch. 534.

Knowledge by the purchaser of restrictive covenants is not knowledge of an irremovable defect, if the purchaser thinks that the covenants have been discharged: *Ellis v. Rogers*, 29 Ch. Div. 661. Restrictive covenants.

Semble, knowledge by the purchaser of leaseholds that the property was liable to forfeiture because of a breach of a covenant to repair, is not knowledge of an irremovable defect, because the lessor might waive the forfeiture by a subsequent receipt of rent, or agree to receive rent or execute a release: *Barnett v. Wheeler*, 7 M. & W. 364 (where there was an express agreement to give a good title).

An express statement that the vendor has a good title, or an express agreement that he will give a good title, negatives the notice or knowledge of the purchaser of any defect in the title: see below, p. 210. Express agreement to give good title.

PART IV.—CONDITIONS AS TO TITLE GENERALLY:

(1) *Conditions enlarging the Purchaser's Right.*

The condition, "if the counsel of the purchaser shall be of opinion that a marketable title cannot be made, this agreement shall be void," was enforced in *Williams v. Edwards*, 2 Sim. 78. But deducing title "to the satisfaction of counsel" means "reasonable satisfaction": *Gordon v. Mahoney*, 13 Ir. Eq. Rep. 383. Conditions enlarging purchaser's right.

"Approval
by solicitors."

Where the contract is made "subject to the approval of the title by the purchaser's solicitor," these words would probably be construed as meaning "nothing more than a guard against its being supposed that the title was to be accepted without investigation ; as meaning, in fact, the title must be investigated and approved of in the usual way, which would be by the solicitor of the purchaser": per Lord Cairns, in *Hussey v. Horne-Payne*, 4 App. Ca. at p. 322. But in *Hudson v. Buck*, 7 Ch. D. 683, where the contract was "subject to the approval of the title by B.'s solicitor," it was held that the approval or disapproval of B.'s solicitor was, in the absence of bad faith or unreasonable conduct, conclusive as to the goodness of the title shown.

"Satisfac-
tory."

A condition enabling the purchaser to rescind "in case the title shall not be satisfactory to the purchaser, his heirs or assigns, or his or their counsel," only entitles the purchaser to make reasonable objections to the title: *Lord v. Stephens*, 1 Y. & C. Exch. 222.

Express
agreement to
give good
title.

An express condition that a good title shall be shown, or that certain persons will convey, enlarges the purchaser's right to a good title in this way: that it sometimes negatives the effect of the purchaser's knowledge or notice of a defect in the title. See above, p. 207, as to purchaser's knowledge of a defect.

If the vendor agrees to make a good marketable title, the purchaser may refuse to complete on the ground that there are restrictive covenants affecting the property, even though the purchaser knew at the time of the contract that there were such covenants, and that it was extremely improbable, and almost impossible, to obtain a release of them: *Cato v. Thompson*, 9 Q. B. Div. 616.

If the vendor asserts, as a distinct fact, that he has a right to sell, the purchaser is not precluded from requiring the vendor to make a good title by a statement, contained in one of the conditions, of facts which show that the vendor had not a good title: *Johnson v. Smiley*, 17 Beav. 223, 233.

Where on a sale of copyhold property the vendor agreed that he would endeavour to enfranchise the property, and deduce a good title as freehold, the purchaser was held not to be able to object to the title on the ground that the enfranchisement

reserved the mines to the lord of the manor: *Kerr v. Paucson*, 25 Beav. 394.

So where the conditions, after stating that the property was settled to such uses as the vendor and his wife should appoint, went on to state that "the vendor would procure a proper assurance to be executed by all necessary persons," and the vendor's wife, who was life tenant, afterwards refused to convey, the Court held that the purchaser was entitled to partial performance by the vendor (who was entitled in fee in reversion), with compensation in respect of the interest of the vendor's wife: *Barker v. Cox*, 4 Ch. D. 464. See above, pp. 133, 134.

But where A. agreed to procure the surrender to B. of an existing underlease, which was, as B. knew, vested in C., then upon A.'s failure to procure a surrender, the Court held B. was not entitled to any relief, because there was no representation by A. that he was able to procure the surrender: *Beeston v. Stutely*, 27 L. J. Ch. 156.

The false statement of the vendor's agent, that the vendor has a good title, affords the purchaser no ground for relief, if the purchaser is buying the vendor out in order to prevent his opposition to a private bill, and is really indifferent whether the vendor has a good title or not: *Hume v. Pocock*, 1 Ch. 379. *Semble*, the false representation of the vendor's agent that the vendor has a good title will not entitle the purchaser to relief, unless made fraudulently: *Ibid.*, p. 385 (but *qu.?*)

(2) *General Conditions restricting the Purchaser's Right to a Good Title.*

Conditions restricting the purchaser's right to a good title must be clearly worded.

Property was put up for sale under the description "a leasehold ground rent of 23*l.* per annum arising from, &c., and reserved by a mesne lease, dated 1812, for 98 years, wanting seven days, and assigned apart from the reversion for the remainder of the term by an indenture dated 1817." There was a condition providing that the title should commence with the assignment in 1817, and that "no purchaser should investigate the prior title, or require the production of the title of any

Conditions
restricting
purchaser's
right must
be clear.

ground or mesne landlord." The deed of 1817 showed that the premises, out of which the 23*l.* rent issued, were, in 1811, demised with other premises at a ground rent of 10*l.*, and subject to conditions, &c., so that the ground rent of 23*l.* was liable to diminution and forfeiture. The purchaser was allowed to rescind on the ground of want of clearness in the conditions: *Taylor v. Martindale*, 1 Y. & C. C. C. 658.

The condition, "no objection or requisition shall be made by the purchaser by reason of the non-acknowledgment of an indenture, dated ———, by a married woman, who was a party thereto," is not sufficient to preclude the purchaser from objecting to the title, if through such non-acknowledgment the vendor has no title at all to one-fifth of the property: *Cumming to Godbolt*, 1 Times Rep. 21.

A condition precluding the purchaser from requiring the conveyance to be executed by any other person than A. B., does not preclude him from objecting to the title on the ground that A. B. has no power of sale, and cannot give a good title. Such a condition is intended only to govern the rights of the vendor and purchaser in relation to the conveyance itself: *Re Molyneux*, 13 L. R. Ir. 382; 15 *ib.* 383. See further, p. 321.

A condition stating that C. had mortgaged to P., and that P. had transferred the security to N., and that P. had afterwards, in exercise of his power of sale, sold to N., and continuing, "the purchaser shall admit that this sale was well made under the power in the mortgage deed, although the mortgagor or his assignees (in case he was then bankrupt or insolvent) did not concur therein," is not sufficient to preclude the purchaser from objecting on the ground that P. had no power of sale, having, by his transfer to N. of the mortgage, transferred the power of sale also. The language of such a condition is calculated to draw the purchaser's attention away from the question whether there was a power of sale: *Cruse v. Nowell*, 4 W. R. 619.

Mere statement of objection.

A mere statement of a possible objection to the title is not sufficient. If the vendor wishes to preclude the purchaser from taking the objection, he must state in the condition that the purchaser shall not take the objection.

Thus, the condition, "notwithstanding sect. 3 of the Disused

Burial Grounds Act, 1884, which renders it unlawful to erect any buildings upon such grounds, except for certain purposes, the vendors believe that they are entitled under sect. 5 of the same Act to sell the property as building ground," does not exclude the objection that under that Act the land cannot be built on: *Trustees of St. Saviour's Rectory and Oyley*, 31 Ch. D. 412.

General conditions will not, as a rule, preclude the purchaser from objecting to a defect in the title which the vendor or his solicitor knew of at the time of the contract: in such a case it is the duty of the vendor to point out, if not the objection itself, at any rate the nature of the objection which the condition is framed to meet. See per Romilly, M. R., in *Beioley v. Carter*, 4 Ch. 230, at p. 234.

Defect known to vendor.

Thus, a condition providing that "no objection or requisition should be made in respect of the underlease of 1852, or of any derivative interest created thereout, or of any underlease or tenancy prior to the said underlease of 1864," was held insufficient to preclude the purchaser from making requisitions in respect of another underlease prior to 1864, which the vendor knew of but did not mention: *Edwards v. Wickwar*, 1 Eq. 68.

A condition stated that the property (which was leasehold) was being sold by a trustee for sale under a will, and that the legatee for life had been in possession for twenty-three years, and concluded, "the purchaser shall not be entitled to require any further evidence of the assent of the testator's executors to the bequest made by the will of the leaseholds, and the fact of such assent shall be admitted by the purchaser." This condition was held to be sufficient to preclude the purchaser from objecting that the administratrix *de bonis non* of the testator claimed, as the vendor knew, to have the power of selling the leaseholds: *Jackson v. Whitehead*, 28 Beav. 154.

The purchaser was held to be sufficiently informed of the defect in title in the following cases:—

Examples of conditions sufficiently clear.

Where the conditions stated that leases (subject to which the land was being sold) had been granted by the vendors, who were trustees, without authority, and provided that the purchaser should not object in respect thereof: *Micholls v. Corbett*, 3 D. J. & S. 18.

Where the conditions provided that the purchaser should not object "in consequence of the non-payment or non-receipt" of a fee farm rent which was offered for sale: *Hanks v. Palling*, 6 E. & B. 659.

Where on the sale of an improved ground rent the conditions provided that no objection should be taken to the sub-lease being in excess of the term of the superior lease, and inspection of the leases was offered, although the purchaser was not told that the fact of there being no reversion would prevent him from having any right of distress: *Smith v. Watts*, 4 Drew. 338.

Reference to document.

The vendor as a rule sufficiently informs the purchaser of a defect in his title appearing on a document if he refer the purchaser to that document for information in such a way as to show that it is important for the purchaser to look at the document in order to see what sort of title he will get, and offers him every facility for inspection.

The following condition was held to be sufficient: "The vendors derive their title under the will of B. In 1861 B. contracted to purchase the houses from T., and a document under seal, dated 27 December, 1861, was executed by the parties. From 1861 to the present time (29 January, 1879), quiet undisturbed possession has been held of the said houses by B. and the vendors. . . . The said document can be seen at the office of the vendors' solicitors at any time previous to the sale, and the purchaser shall be deemed to have knowledge of the contents. The title shall commence with the said document. . . . The purchaser shall assume that B., by the said document, and by his undisturbed possession, was at the time of his death seised in fee of the houses": *Blenkhorn v. Penrose*, 29 W. R. 237. The document mentioned was only an agreement.

Purchaser's capacity.

The Court takes into account the capacity of the purchaser in estimating whether a condition was sufficiently clear to inform him of the real state of the title. Thus, in *Minet v. Leman*, 7 D. M. & G. 340, at p. 352, Knight-Bruce, L. J., considered that a condition was clear enough to preclude the purchaser who was "an experienced and able member of the legal profession;" and in *Williams v. Wood*, 16 W. R. 1005, Romilly, M. R., said: "The conditions of sale have been very carefully

framed, and the facts are correctly stated, and so stated as to lead a practised lawyer to the legal inference that no title was shown in the vendor, but they are drawn in a way which would not lead an ordinary purchaser to this conclusion."

Conditions limiting the purchaser's right to have a good title shown are of two kinds:— Rule of *aliunde*.

(1) Those which preclude him from making requisitions upon the vendor as to the title, or calling upon the vendor to prove certain facts.

(2) Those which preclude him from making any investigation anywhere into the title, or which bind him to accept certain facts as true whether they are true or not.

Where the first kind of condition is used, the purchaser is merely prevented from exercising his ordinary right of asking the vendor for information as to the title, or demanding proof of certain facts; if he discovers a defect in the title, or finds that the facts in question are untrue, he may object to the title notwithstanding the condition. Such a discovery is often called a discovery *aliunde*, i.e., from some other source than the vendor's answers to requisitions. A discovery *aliunde* will include information obtained by the purchaser from third parties, or through searching at the registry (*Re Davys and others*, 17 L. R. Ir. 334), or disclosed by the abstract of title (*Phillips v. Caldcleugh*, L. R. 4 Q. B. 159), or appearing in a deed forming part of the title (*Waddell v. Wolfe*, L. R. 9 Q. B. 515), or given by the vendor himself (*Smith v. Robinson*, 13 Ch. D. 148). Where the second kind of condition is used, a discovery *aliunde* of a defect covered by the condition will not enable the purchaser to object to the title unless the condition contains some express or implied misstatement of fact.

The following conditions have been held to be conditions of the first kind, and only to preclude the purchaser from making requisitions upon the vendor:— Conditions of first sort.

The condition that "the vendor shall not be obliged or compelled to produce, prove, or show the lessor's title": *Blake v. Phinn*, 3 C. B. 975.

The condition that the purchaser "shall not call for the lessor's title" (*Madeley v. Booth*, 2 De G. & S. 718); or that

"the lessor's title shall not be inquired into": *Darlington v. Hamilton*, Kay, 550. In the latter case Page-Wood, V.-C., overstates the rule. "It is quite clear," he says, "according to the doctrine of *Warren v. Richardson* and *Shepherd v. Keatley*, that whatever may be the terms of the condition of sale, if the purchaser obtains information *aliunde* that the title of the vendor is not clear and distinct, he has a right to insist upon the objection." The case of *Spratt v. Jeffery*, 10 B. & C. 249, must either be distinguished or considered as overruled. In that case the vendor agreed to sell leaseholds, "as he holds the same," and the purchaser agreed to buy "without requiring the lessor's title"; it was held that the purchaser could not refuse to complete on account of an objection to the lessor's title. This decision can only be upheld on the ground that the words "as he holds the same" are equivalent to "with such title as the vendor has." See the remarks of Lush, L. J., on the case in *Phillips v. Caldcleugh*, L. R. 4 Q. B. 159. However, this was not the *ratio decidendi* of the case (see remarks of Littledale, J., at pp. 258, 260, of 10 B. & C.), and the words seem to be too ambiguous for such a construction. *Spratt v. Jeffery*, is disapproved of by Malins, V.-C., in *Harnett v. Baker*, 20 Eq. 55; and also in *Shepherd v. Keatley*, 1 C. M. & R. 117. Knight-Bruce, V.-C., in *Duke v. Barnett*, 2 Coll. 337, at p. 341, says *Spratt v. Jeffery* and *Shepherd v. Keatley* are reconcilable.

The condition, "no requisition or inquiry shall be made respecting the title of the lessor," was held not to preclude objections discovered *aliunde*: *Waddell v. Wolfe*, L. R. 9 Q. B. 515; but see *Hume v. Bentley*, 5 De G. & Sm. 520, below, p. 218. In *Waddell v. Wolfe* it was thought from the context that "inquiry" meant inquiry of the vendor, *i. e.*, requisition, and had not such a wide sense as in *Hume v. Bentley*.

The condition that the title should commence with a specified deed, and that no earlier or other title should be "required or inquired into" by the purchaser, was held not to preclude the purchaser from objecting to a defect accidentally disclosed by the vendor, such defect not being discovered through any "inquiry" made by the purchaser: *Smith v. Robinson*, 13 Ch. D. 148.

The condition, "no requisitions to be made in respect of the

title prior to the conveyance of the 12th May, 1869," does not preclude the purchaser from requiring proof of the discharge of judgment mortgages of an earlier date, which he has himself discovered by searching the register: *Re Darys and others*, 17 L. R. Ir. 334.

A vendor of copyholds, who had been admitted by the lord without any surrender by the previous tenant, sold under a condition that "no earlier or other title shall be deduced, nor any deed or document produced anterior to the last copy of court-roll by which the copyhold premises were granted; . . . nor shall the vendor be required to produce the court-roll; . . . nor shall the purchaser be at liberty to question the right of the lord of the manor to grant such copy." This condition was held to be insufficient to preclude the purchaser from objecting to the title on the ground that, owing to the non-surrender, the legal estate was outstanding, the defect being discovered by the purchaser without any requisition on the vendor: *Sellick v. Trevor*, 11 M. & W. 722.

The following condition was held not to preclude objections *aliunde*: "The purchaser shall not be at liberty to require any evidence of the title of the lessors in said lease, or any of them, or object by reason of incumbrances, if any, affecting the title of such lessors; nor require the production of any title deeds connected with the premises prior to, or of previous date to, said lease; but shall admit that said lease has been duly executed and acknowledged by all the parties thereto, and be satisfied with same being handed over to them, and the title deduced therefrom to the vendors." The lease was described as a lease "for ever," but was, as appeared on the face of it, a sub-demise by persons who were lessees under a lease for lives renewable for ever: *Musgrave v. M'Cullagh*, 14 Ir. Ch. R. 496.

Even a condition that the purchaser "shall assume that A. C. was beneficially entitled free from incumbrances," was considered in one case as not precluding the purchaser from objecting on the ground of information obtained *aliunde*: *Harnett v. Baker*, 20 Eq. 50. Malins, V.-C., said there (p. 57) that *Hume v. Bentley* (5 De G. & Sm. 520) might have applied had the condition been that the fact "should not be questioned," apparently

construing "shall assume" as "shall not require the vendor to prove." This, however, seems to be erroneous: see *Best v. Hamand*, 12 Ch. Div. 1. The decision in *Harnett v. Baker* can be supported on the other *ratio decidendi*, viz., that the vendor knew the statement of fact implied in the condition was erroneous: see *Re Banister*, 12 Ch. Div. 131, above, p. 171.

Conditions
excluding
defects disco-
vered *aliunde*.

The following conditions were held to be conditions of the second kind, and to preclude the purchaser from objecting to the title even in respect of defects discovered *aliunde*:—

"The lessor's title will not be shown, and shall not be inquired into": *Hume v. Bentley*, 5 De G. & Sm. 520; but see above, p. 216, *Waddell v. Wolfe*, L. R. 9 Q. B. 515.

"T. agrees to take the same title as M. took on purchasing from the devisees and executors of B.": *Monro v. Taylor*, 8 Ha. 51, at p. 71. The condition that the purchaser shall have "such title as they (the vendors) have received from Lord Oxford," does not entitle the purchaser to inquire what title the vendors received, or to object that the conveyance from Lord Oxford was executed only a year before the contract: *Wilnot v. Wilkinson*, 6 B. & C. 506. Where the assignees of a bankrupt sold "under such title as he lately held the same, an abstract of which may be seen at, &c.," the purchaser was held unable to insist upon any other title than the bankrupt had: *Freme v. Wright*, 4 Madd. 364.

An agreement for a lease contained an option for the lessee to purchase, and an agreement by the lessee "in case of such purchase and conveyance as aforesaid, to accept the title of E. (the lessor) without dispute." Upon exercising the option, the lessee's assignee objected to the title on the ground that upon the release (executed prior to the agreement) of an incumbrance affecting that and other property, the property in question was not included, and the legal estate was outstanding. It was held that the objection was precluded by the condition: *Duke v. Barnett*, 2 Coll. 337.

H. agreed to sell P. all his estate, right, and interest in certain lands, "and H. shall be called upon to produce only the title from B. to himself." Both H. and P. knew that there were other claimants to the property beside B., but P. was

anxious to buy B. out, in order to remove his opposition to a bill in Parliament affecting the land, and had induced H. to purchase B.'s interest. It was held that P. was not entitled to show *aliunde* that B.'s title was defective: *Hume v. Pocock*, 1 Ch. 379.

A., being tenant from year to year of a public-house, agreed to let to B. "all his right, title, and interest," provided that, if B. should not be accepted as a tenant by F. and H., the superior landlords, subject to terms mentioned in the margin (which were, "F. and H. agree to grant B. a lease of thirty-five years, at 200*l.* rent"), the agreement was to be void. It was held that this amounted merely to an agreement by A. to sell such interest as he himself possessed, with a proviso avoiding the agreement if a valid lease were not obtained from F. and H.; it did not amount to a covenant by A. to procure a lease from F. and H., and to make a good title: *Tweed v. Mills*, L. R. 1 C. P. 39.

On a sale of freehold land, together with a fee-farm rent of 21*s.* on other hereditaments, there was a condition that "no evidence should be required of the receipt, or payment, or existence of the ground rent of 21*s.*, other than that disclosed by the conveyance to H., deceased, nor should any objection be taken to the title in consequence of the non-payment or non-receipt of the said rent." It appeared that the rent had not been paid for twenty years or more; but the purchaser was held to his bargain: *Hanks v. Palling*, 6 E. & B. 659.

The condition, "the judge having seen fit to order a sale of the reversion, notwithstanding several infants are interested therein, the jurisdiction of the Court to make such order shall not be questioned, nor shall any objection or requisition be made on account of such order," is a fair and reasonable condition, and binding on a purchaser, even if there may be a doubt as to the jurisdiction: *Nunn v. Hancock*, 6 Ch. 850.

A condition stating that the will under which the vendors are executors does not contain any power of granting leases, but the executors have, with the concurrence of the life-tenant, granted leases, and continuing, "no objections or requisitions shall be made in respect of such leases having been granted, and the

purchaser shall take subject to such interests as the tenants may be entitled to under the same," is sufficient, although the vendors have been guilty of a breach of trust in granting the leases: per Knight-Bruce, L. J., *Micholls v. Corbett*, 3 D. J. & S. 18.

"Assume."

There is considerable conflict of authority as to the effect of a condition requiring the purchaser to "assume" certain facts. Apart from authority, this would seem to be a condition of the second sort, precluding the purchaser from objecting, even if he discovers that the facts are not as stated. In *Best v. Hamand*, 12 Ch. Div. 1, the condition was that the purchaser should "assume and admit" certain facts, which the purchaser afterwards discovered to be incorrect; it was held that he was bound by the condition. In *English v. Murray*, 49 L. T. N. S. 35, there was a condition that certain specified indentures of lease and release "contain no express mention of the said three undivided thirtieth shares of J. N., of and in the coal and minerals under the said lands . . . nevertheless P. shall assume that the same shares passed by the same indentures." Before completion, the vendor discovered and informed the purchaser that, in 1739, the said shares in the minerals had been conveyed to someone else, so that the vendor had no title to them. It was held that the purchaser could not rescind, because he was precluded by the condition, but compensation was granted under another condition.

Where the condition was, "the purchaser shall assume that A. C. was, at his death, beneficially entitled to the property in fee simple free from incumbrances," the fact being that A. C. had contracted to purchase the property from persons whose title to sell was doubtful, the purchaser was relieved, partly on the ground that the condition was misleading, and partly on the ground that the condition only precluded the purchaser from requiring the vendor to prove the fact: *Harnett v. Baker*, 20 Eq. 50.

"Conclusive evidence."

The effect given to the words "conclusive evidence" is not well settled. It is sometimes held that a condition making certain proof *conclusive* evidence of a fact will not preclude the purchaser from objecting to the title if he can prove that the facts were otherwise.

Thus, a condition making recitals twenty years old "sufficient and conclusive evidence" of the documents and facts recited did not preclude the purchaser from showing that a recital of a will was inaccurate: *Else v. Else*, 13 Eq. 196.

So, probably, a condition that "possession under the lease shall be deemed conclusive evidence of the due performance or sufficient waiver of any breach of the covenants in the lease," would not be sufficient if it were proved that the landlord intended to enforce the forfeiture: per Romilly, M. R.; in *Howell v. Kightley*, 21 Beav. 331, at p. 333.

But, in another case, a condition making the last receipt for rent "conclusive evidence" of the performance of the covenants (nothing being said in the condition about waiver of breaches) was considered sufficient, even though the purchaser proved that the covenant had been broken: *Bull v. Hutchens*, 32 Beav. 615.

And in *Osborn v. Osborn*, 18 W. R. 421, Malins, V.-C., speaking of a condition that the title should commence with a deed dated 8th April, 1858, to which the purchaser objected, because the persons conveying were a waterworks company, which only had power to convey under certain circumstances, said: "It would have been better if the condition had been more stringent, and had gone on to say that the deed should be *conclusive* evidence of the vendor's title to convey; in which case the purchaser would have had no right to object to the title, even if he had discovered a flaw *aliunde*."

Even if the condition is sufficient, if taken alone, to preclude the purchaser from requiring a good title to be shown, other conditions in the same contract may give the purchaser this right. Thus, where one condition stipulated that the purchaser should take such title as the vendor had, but another condition stipulated that the vendor should deliver an abstract, and that the purchaser should make his requisitions within a certain time, this was held to import that the purchaser might object to the title; for, as Turner, V.-C., said, "If the purchaser is not to have any title, what is the use of his taking objections?" *Keyse v. Haydon*, 1 W. R. 73. However, on further consideration, Wood, V.-C., held that the purchaser was not entitled to

Condition
excluding
purchaser's
right over-
ruled by other
conditions.

an absolute title, but merely to some *bonâ fide* title, the best in the vendor's power: 1 W. R. 112; 20 L. T. 244.

Facts stated
in conditions.

A condition must contain no misstatement of fact. In the absence of express stipulation, the purchaser may require evidence of any fact stated in a condition restricting his right to call for the title: *Symons v. James*, 1 Y. & C. C. C. 487.

Implied mis-
statement.

A misstatement of fact may be implied in a condition. Thus, the condition that the purchaser shall require no further evidence of identity than that afforded by the abstracted documents, contains an implied statement that the abstracted documents do afford some evidence of identity, and the implication is falsified if the parcels in the deeds are not identical with each other. See p. 245.

Pedigree.

But a condition that the purchaser "should admit the vendor's heirship to the last owner upon a copy of his pedigree, and should not require any further evidence," was enforced, although the copy of the pedigree failed to trace the heirship: *Nash v. Broirne*, 32 L. J. Ch. 148. This decision is open to serious doubt, because the condition implied that the copy of the pedigree showed the vendor's heirship, and the stipulation that the purchaser should not require any "further evidence" virtually asserted that the copy pedigree tended to prove the fact, that it was evidence up to a certain point.

Bona fides.

Conditions must not even by implication state that which the vendor knows to be false. Conditions must be framed in good faith, and must not be calculated to mislead.

A condition stating that "it is not accurately known, and cannot be satisfactorily explained, how A. B. acquired the property, and the purchaser shall make no requisition, &c.," is misleading if the vendor knew and could explain how A. B. acquired the property: *Re Banister*, 12 Ch. Div. 131.

In one case the vendor put up for sale "the interest, if any, of N." in certain chattels and leaseholds, knowing that N. had no interest, but instructing his clerk to bid. A condition provided that "even if it should appear that N. had no interest in the premises the purchaser should have no remedy against the vendor to compel him to refund." The plaintiff purchased for 150*l.*, the price being run up by the vendor's clerk. The sale

was set aside on the ground of unfairness, the vendor knowing that the subject of sale *was* worthless, the purchaser merely knowing that it *might be* worthless: *Smith v. Harrison*, 26 L. J. Ch. 412.

A vendor is not entitled to say that the purchaser shall "assume" or "admit" that which, to the vendor's knowledge, is untrue.

"Requirement or insistence that a certain state of things shall be assumed, does by implication contain an assertion that no facts are known to the persons who require it which would make that assumption a wrong one according to those facts": per Brett, L. J., in *Re Banister*, 12 Ch. Div. 131, at p. 146.

In *Best v. Hamand*, 12 Ch. Div. 1, the vendor agreed to sell land which he had purchased from a railway company as surplus land. The agreement contained a stipulation that the purchaser "should assume and admit that everything (if anything were necessary) had been done by the company to enable them to sell and effectually convey the said pieces of land as surplus lands, and should not call for or require the production of any evidence to that effect." The purchaser subsequently discovered that no offer had been made by the company to the original or adjoining owners as required by the Lands Clauses Act, 1845, sect. 128, and that two of such owners had not waived their right of pre-emption. The Court of Appeal, reversing Hall, V.-C., held that the purchaser was bound by the stipulation to admit the company's title to sell to the vendor. This decision may be reconciled with that of *Re Banister*, 12 Ch. Div. 131, by assuming that the vendor was ignorant of the facts; but this is not the ground of the judgment, which simply ignores the question of the vendor's knowledge, although it was mentioned in the argument that the vendor knew no offer had been made. See 12 Ch. D. p. 8. Lord Justice Fry, Sp. Perf., p. 559, thinks it possible that the decision may be limited to the point actually decided, viz., that the purchaser was bound by the stipulation to the extent of not being able to recover his deposit; but see below, p. 346.

If there are special conditions which show that the purchaser is only to have a good holding title, the purchaser cannot insist

Conditions giving right to good holding title.

on more than a good holding title, even if he is relieved against the special conditions themselves on the ground that they are misleading: *Re Banister*, 12 Ch. Div. 131, 145.

A condition mentioning a deed alleged to be executed by the vendor, and continuing, "the vendor has declared that the said alleged indenture is a fabrication, and has made his solemn affidavit that he never executed any such indenture, and that such indenture is a forgery . . . and the purchaser shall not make any objection on account of the said alleged indenture," was held to be sufficient to preclude the purchaser from rescinding, even though the deed was declared by a jury to be genuine: *Cattell v. Corral*, 4 Y. & C. 228.

Catching conditions.

If the purchaser notices or has his attention called to the fact that the conditions are framed with a view to cover defects in title, he cannot afterwards complain that the conditions are stringent.

Where the purchaser asked, "Can a good and marketable title be made?" and the vendor's solicitor replied that it could under the existing conditions, it was held that this was sufficient to call the purchaser's attention to the stringent nature of the conditions, and he was not allowed to resist specific performance on the ground that the conditions were oppressive: *Hyde v. Dallaway*, 6 Jur. 119.

Fraud and common mistake.

Even though the purchaser is precluded by the conditions from investigating or requiring the title, he will be relieved in case of the vendor's fraud, or of a "common mistake" (as to which, see p. 78).

Thus, where the agreement for sale stipulated that the purchaser should assume that E. M., who died in 1841, was seised in fee, and should not require the production of or investigate or make any objection in respect of the prior title, and the prior title showed that the property belonged not to the vendor but to the purchaser in fee, subject to a lease to the vendor, specific performance was refused on the ground of "common mistake": *Jones v. Clifford*, 3 Ch. D. 779.

"Such title as the vendor has."

The condition that the purchaser shall take "such title as the vendor has," does not bind the purchaser to complete if the vendor has no title at all: per Wood, V.-C., in *Keyse v. Hayden*, 20 L. T. 244.

The words mean, shall take such title as the vendor can make out from the documents in his possession: *Ibid*.

A condition mentioning a settlement made by the vendor's mortgagor, and providing that it should be deemed to be void as against a mortgagee or purchaser, and allowing the purchaser inspection at the sale, will not preclude the purchaser from objecting that the settlement is good and that the vendor has absolutely no title at all. See *Re Cameron and Wells*, 57 L. T. N. S. 645.

A condition stating that part of the property was with other land demised to A., and has since been treated as freehold, and continuing, "the vendors sell and will convey to the purchaser only such right or interest, if any, as they may have therein, but shall not be required to produce any title or evidence of title thereto," does not preclude the purchaser from requiring the vendor to convey his interest free from an existing incumbrance: *Goold v. Birmingham Bank*, 58 L. T. N. S. 560.

The condition binding a purchaser to accept such title as the vendor has does not absolve the vendor of his duty of preparing an abstract; the purchaser, though compelled to accept the title, whatever it may be, is entitled to require the vendor to show him what the title is: *Dart*, 173, 319. Abstract.

And it would seem that notwithstanding a condition binding the purchaser to accept certain evidence, the purchaser is entitled to better evidence if the vendor has any; and if not, to a statutory declaration by the vendor that he has no better evidence in his possession. See *Bird v. Fox*, 11 Ha. at p. 48. Better evidence.

On a sale of copyholds under the conditions, "the vendors to give such title as they now possess to extend over a period of twenty years," and "the purchaser to prepare his own conveyance and surrender at his own expense," the vendors were held bound not only to convey their equitable title, but also to give the purchaser a surrender of the legal estate and pay the fines necessary to enable them to surrender: *Whiteley v. Taylor*, 35 L. T. N. S. 187.

PART V.—CONDITIONS AS TO SPECIAL MATTERS.

(i.) *Commencement of title.*

Commence-
ment of title
in absence of
stipulation.

In the absence of express agreement, the purchaser is entitled to require, in the case of advowsons, a hundred years' title, or sixty years with three presentations during that period (1 Dav. 439); and in the case of other hereditaments, a forty years' title subject to the rules laid down below in particular cases. See Vendor and Purchaser Act, 1874, s. 1.

Leaseholds.

On the sale of leaseholds, the title must commence with the lease, however old (*Frend v. Buckley*, L. R. 5 Q. B. 213), though the title subsequent thereto need not be traced for more than the forty years next preceding the contract of sale. On the sale of property held under a lease or sub-lease less than forty years old, it is sufficient to commence with the lease or sub-lease. "Under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold": Vendor and Purchaser Act, 1874, s. 2, rule 1. "Under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion": Conveyancing Act, 1881, s. 3 (1). These two enactments do not alter the law with regard to a lease for lives, nor do they touch the case of a contract to *grant* an underlease.

"Where land sold is held by lease, the purchaser shall assume, unless the contrary appears, that the lease was duly granted": sect. 3 (4). "Where land sold is held by underlease, the purchaser shall assume, unless the contrary appears, that the underlease and every superior lease were duly granted": sect. 3 (5).

Reversion.

On the sale of a reversion, the title must commence with the deed creating the reversion, however old that deed may be: Dart, 335.

Crown grant.

On the sale of any property held under a grant from the Crown, *e. g.*, tithes, the title must commence with the grant: Sug. 367.

Subsequent
title.

In such cases, though the title may have to commence with a deed older than forty years, the vendor is only bound to trace the subsequent title for the last forty years: *Ibid.*

"Where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then under a contract to sell and convey the freehold the purchaser shall not have the right to call for the title to make the enfranchisement": Conveyancing Act, 1881, s. 3 (2). According to Wolstenholme and Turner, this sub-section places the title to the freehold of enfranchised copyholds on the same footing as the title to a lease, so that the title commences with the deed of enfranchisement. But if the enfranchisement took place more than forty years ago, the title would not necessarily commence with the deed of enfranchisement in the same way as a leasehold title commences with the lease, however old. A forty years' freehold title would be sufficient, and the purchaser could not call for the enfranchisement deed even if the title deeds abstracted and produced recited or referred to it. And if the enfranchisement were less than forty years old, the previous copyhold title must, it is submitted, be shown for a sufficient period: see 1 Preston Abstr. 205; and 1 Dav. 439.

Enfranchised copyholds.

If the document with which the title commences is not a good root of title, more than forty years' title may be required.

Root of title.

A disentailing deed (Sug. 366), a conveyance under a trust for sale, and (unless the Conveyancing Act, 1881, has made a difference in this respect) an appointment under a power (1 Prest. on Abstr. 249), are not good roots of title. The purchaser is entitled to have the deed creating the entail, trust, or power produced for his inspection. See, however, as to appointments under powers, p. 228, below. Probably, however, if the deed were lost, proof of possession for a considerable time would make the title one which could be forced on a purchaser. See Sug. 366.

Disentailing deed, &c.

A voluntary deed, if forty years old, may be a good root of title: per Cotton, L. J., in *Re Marsh and Earl Granville*, 24 Ch. Div. 11.

Voluntary deed.

If the earliest document of title is a will, proof of testator's seisin is necessary. See *Parr v. Lovegrove*, 4 Dre. 170, at p. 177.

Will.

The stipulation that the purchaser shall accept a possessory title is not sufficient to shorten the period of title which the purchaser may require: *Douglas v. L. & N. W. Ry. Co.*, 3 K. & Jo. 173.

Possessory title.

Prior title.

"A purchaser of any property shall not require the production, or any abstract or copy, of any deed, will, or other document, dated or made before the time prescribed by law, or stipulated for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall he require any information, or make any requisition, objection, or inquiry with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title is recited, covenanted to be produced or noticed; and he shall assume, unless the contrary appears, that the recitals, contained in the abstracted instruments, of any deed, will, or other document forming part of that prior title are correct, and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, enrolment, or otherwise": Conveyancing Act, 1881, sect. 3 (3).

Rule of
aliunde.

In construing this sub-section, it is to be observed that the purchaser is only precluded from "requiring," *i.e.*, demanding from the vendor; he is not precluded from objecting to defects discovered *aliunde*. See p. 215. Further, he is only bound to "assume, unless the contrary appears." See p. 220.

Appointment
under power.

It is not easy to determine what is the effect of this sub-section upon the older rule of law that a deed exercising a power of appointment is not a good root of title. We may take separately the two cases (1) where the appointment is more than forty years old; and (2) where the appointment, being less than forty years old, the vendor, by a special condition, makes his title commence with it, but omits to mention that it is an appointment. In the first case, it might be argued that the purchaser, who requires the abstract to commence with the deed creating the power, is not requiring an abstract of a deed made "before the time prescribed by law," because, in the case of appointments, the law does not prescribe a fixed period of forty years, but says the title shall commence with the deed creating the power; the date of that deed is, therefore, the "time pre-

scribed by law." It seems a sufficient answer to this argument to say that, if it were allowed, no effect would be given to the words of the sub-section, which must mean something and make sense if "the time prescribed by law" is construed to mean forty years. But, in the second case, there appears to be more ground for arguing that, notwithstanding the sub-section, the purchaser could demand the abstract of the deed creating the power, on the ground that, in limiting the purchaser's length of title, the vendor ought to tell him the nature of the deed with which the title is to commence, if that deed is one not usually regarded as a good root of title. See *Re Marsh and Earl Granville*, 24 Ch. Div. 11, below, p. 231. This view is supported by sub-sect. (11), which says the statutory conditions are to be treated as similar express conditions would be apart from the Act. The difficulty is that it is inconceivable that a condition expressed in the very words of sub-sect. (3) would ever be employed, for a vendor would either omit all references to appointments under powers as not affecting his property, or would, instead of a vague reference as in sub-sect. (3), mention the fact that the root of title was such an appointment. It might, therefore (though the opposite view is preferable), be held that sub-sect. (11) is, from the nature of the case, inapplicable to that part of sub-sect. (3) which refers to appointments, and that an appointment under a power is now a good root of title, even if less than forty years old, and not described in the conditions as an appointment.

A question might arise as to the effect of the statement in a deed forming part of the title and abstract, that the deed was "supplemental" to a previous deed not abstracted and dated prior to the commencement of the title, or that it was "to be read as an annex" to such previous deed. It would seem, from sect. 53 of the Conveyancing Act, 1881, that the purchaser is entitled to read the previous deed, as he would have been able to read the recital thereof if it had been actually recited, sect. 53 providing that a supplemental deed, or one directed to be read as an annex, is to be construed as if it contained a full recital of the previous deed. Sect. 3 (3) only precludes the purchaser from *making requisitions* as to a recited deed dated

prior to the commencement of the title; and the purchaser might, by reading the previous deed, discover defects in the title without making requisitions on the vendor: see p. 215.

Agreement
for lease.

"Where a lease is made under a power contained in a settlement, will, Act of Parliament or other instrument, any preliminary contract for or relating to the lease shall not, for the purpose of the deduction of title to an intended assign, form part of the title or evidence of the title to the lease. This section applies to leases made either before or after the commencement of the Act": Conveyancing Act, 1882, sect. 4.

Dealings with
agreement.

The words "for the purpose of the deduction of title" would appear to limit the effect of the section, so as to enable a purchaser who discovers *aliunde* (*i. e.*, without calling upon the vendor for the preliminary contract) that there have been dealings by the vendor with the preliminary contract (*e.g.*, a mortgage thereof), to object that the vendor's title to the lease is defective.

Agreement
mortgaged.

The condition "the vendor shall produce a good and marketable title to the premises commencing from the freeholder at his own expense, but no title or evidence of title shall be required to be produced or authenticated anterior to the date of the lease," does not preclude the purchaser from inquiring as to dealings with the preliminary contract for the lease which have been brought to his notice by the vendor: *Rhodes v. Ibbetson*, 4 De G. M. & G. 787, where the contract had been mortgaged. This case was decided on the ground of want of clearness in the condition, but the decision might also be supported on the rule of *aliunde*, see p. 215.

Conveyance
under limited
power.

The fact that the deed with which the title is made to commence is a conveyance by a corporation which only had power to convey in certain circumstances, does not entitle the purchaser to question the competency of the corporation to convey or to require evidence that the circumstances under which alone they were empowered to convey existed at the date of the deed: *Osborn v. Osborn*, 18 W. R. 421.

If, on the other hand, the purchaser had shown that these circumstances did not exist, he could have objected to the title: *Ibid.*

A condition that the abstract shall commence with a specified deed, and that no purchaser shall investigate or take objections in respect of the title prior to the commencement of the abstract, does not preclude the purchaser from taking the objection that the deed with which the abstract commences shows that the freehold is encumbered with certain covenants: *Phillips v. Caldcleugh*, L. R. 4 Q. B. 159. Rule of *abunde*.

A condition that the purchaser shall not require the production of any title prior to the lease under which the vendor holds, does not relieve the vendor of the duty of proving the execution of the lease: *Laythoarp v. Bryant*, 1 Bing. N. C. 421. But it would seem that the Conveyancing Act, 1881, sect. 3 (4), binding the purchaser to assume the lease was "duly granted," is sufficient to preclude him from requiring the execution thereof to be proved; but *qu*.

Conditions shortening the title to be given to the purchaser must like other conditions be fair and explicit. Condition must be clear.

"The test of its being fair and explicit is whether it discloses all facts within the knowledge of the vendor which are material to enable the purchaser to determine whether or not he will buy the property, subject to the stipulation, limiting his right to the ordinary length of title": per Cotton, L. J., in *Re Marsh and Earl Granville*, 24 Ch. Div. at p. 24. If the condition makes the title commence with a deed less than forty years old, "it is most material for enabling a purchaser to decide whether he will enter into such a contract that he should know whether the deed was upon a transaction in which there would be an investigation of the title": *Ibid.*, p. 25.

The condition that the title shall commence with a specified indenture, which is dated less than forty years ago, is a misleading condition if the indenture is a voluntary revocable deed, unless the deed is described in the condition as voluntary and revocable: *Re Marsh and Earl Granville*, 24 Ch. Div. 11. Voluntary revocable deed.

On the sale of an underlease before the Conveyancing Act, 1881 (see p. 226), a condition that the purchaser should not inquire into the title "prior to the lease by which the premises are held," was considered ambiguous, and the purchaser was held entitled to construe it as only precluding him from ex- Ambiguous condition.

amining the title prior to the original lease: *Seaton v. Mapp*, 2 Coll. 556.

Lease by
copyholder.

On an agreement by a copyholder to grant a lease, a stipulation that the lessee "should not require the title of the lessor to be produced," was construed as referring to the title of the lord of the manor, on the ground that if the title of the lessor was meant, the lessee would be bound to take a lease, even if the lessor had no title to grant one: *Hanbury v. Litchfield*, 2 My. & K. 629. The correctness of this decision may be doubted.

Underlease.

The condition that the purchaser "shall not call for the lessor's title," does not preclude him from objecting that the property sold is an underlease, but has been described simply as a "lease": *Madeley v. Booth*, 2 De G. & S. 718.

Recitals
20 years old.

(ii.) *Recitals in documents twenty years old.*

"Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions": Vendor and Purchaser Act, 1874, sect. 2 (2). As to recitals of documents, see Conveyancing Act, 1881, sect. 3 (3), at the end of the sub-section, p. 228, above.

Inferences.

The recital of a fact is, by the Act, made sufficient evidence of the fact recited, but not of any fact, however probable, which may be inferred from it. A fact which must *necessarily* be inferred from the recited fact would no doubt be held to be covered by the statutory condition; but a fact which is merely the possible or probable result of the fact recited would not be within the condition.

Thus, where the condition was that deeds ten years old should be "conclusive evidence of everything recited or stated therein," and the vendor offered as proof that the land was free from land-tax, a deed in which the consideration was expressed to have been paid "in full for the absolute purchase of the premises, and the fee simple and inheritance thereof in possession, free from land-tax and all other incumbrances," it was held that the purchaser was not precluded by the condition from requiring

better proof. The only direct statement in the deed was that the property was *sold* free from land-tax; it was not a necessary inference from this that the person so selling was entitled free from land-tax: *Buchanan v. Poppleton*, 4 C. B. N. S. 20.

In *Re Marsh and Earl Granville*, 24 Ch. Div. 11 (see p. 19), Fry, J., was of opinion that a recital twenty years old, that the trustees of a voluntary revocable settlement had, "in pursuance of the trust for sale conferred on them by the settlement, caused the premises to be put up for sale," was sufficient evidence of the fact that the settlor had not revoked the settlement, or made any sale for valuable consideration. But other evidence to this effect had been given by the vendor, so that it was not necessary to decide the point of the construction of the statute.

In *Goold v. White*, Kay, 683, Page-Wood, V.-C., doubted whether a recital in a surrender that J. had then lately been admitted there tenant in tail, according to the custom of that manor, was by the condition as to recitals made sufficient evidence that such admission was according to the custom, "because that is not a single fact, but rather a deduction from a series of facts." There seems, however, to be no foundation for this doubt. The existence of a custom is a fact as much as any other fact. If the doubt had been whether the recital was sufficient, seeing that it did not directly state that there was a custom to entail, but merely allowed it to be inferred, the test laid down in *Buchanan v. Poppleton*, 4 C. B. N. S. 20 (see above), would show that the recital was sufficient, because the inference that there was such a custom was one necessarily to be drawn from the recital.

In *Bolton v. London School Board*, 7 Ch. D. 766, Malins, V.-C., was of opinion that a recital in a deed twenty years old, that the then vendor was then seised in fee simple, precludes the purchaser from demanding the prior abstract, unless he can himself show that the recital is inaccurate. It is to be observed, that the remarks of Malins, V.-C., on this point are *obiter dicta*, as he himself points out (see p. 771 of the report), the judgment turning on the right of a purchaser in possession to pull down buildings. The doubt of Page-Wood, V.-C., in *Goold v. White*, Kay, 683, at p. 687, would apply forcibly to a recital that "A. Recital of
seisin in fee.

is seised in fee simple," because this is not a fact, but a deduction of law from a series of facts; but this doubt seems ill-founded. A more pressing objection to the view taken by Malins, V.-C., is that sect. 1 of the Vendor and Purchaser Act, 1874, expressly gives the purchaser the right to have a forty years' title; and sect. 2 (2) does not make a twenty years old recital conclusive evidence, but only sufficient evidence until the recital is proved to be inaccurate; so that the purchaser is entitled to have the earlier abstract furnished, so that he may, if possible, show the inaccuracy of the recital.

The correctness of *Bolton v. London School Board* is doubted in Davidson, Vol. I., p. 110; Wolstenholme & Turner's Conv. Act, p. 12. Mr. T. C. Williams (Conveyancing Statutes, p. 11) says the recital in *Bolton v. London School Board* was insufficient, because it did not add "free from incumbrances"; and refers to *Nott v. Riccard*, 22 Beav. 307, 313, cited below, p. 236. The editors of Sweet's Concise Precedents (p. 289, ed. 3), uphold the view of Malins, V.-C., on the ground that "proof of forty years' title is only a working substitute for absolute proof of title, and the proof of the ownership of a former vendor, though selling within that period, and of the subsequent devolution from him to the actual vendor, constitutes absolute proof"; but this confounds the purchaser's right to an abstract of title with his right to proof of the title. It would be a fair *reductio ad absurdum* to say, that on the authority of *Bolton v. London School Board* a vendor who sells in 1889, having had the property conveyed to him in 1888 by a deed containing a recital that the grantor was seised in fee simple, could by saying nothing as to the commencement of title and employing a condition that all recitals contained in any deed relating to the property should be conclusive evidence, reduce the length of title which he is bound to give from forty years to one year.

Not conclusive evidence.

The statutory condition does not make recitals twenty years old *conclusive* evidence, the purchaser is not, therefore, precluded from showing the inaccuracy of the recitals. But even if the vendor used a condition making such recitals conclusive evidence, it is not quite clear that the purchaser would be precluded from proving *aliunde* their inaccuracy: see *Else v. Else*, 13 Eq.

196; and see above, p. 220, as to the effect of a condition making certain proof "conclusive."

(iii.) *An outstanding legal estate.*

A condition stating the title to leasehold property, and showing that the legal estate was outstanding, and stipulating "the purchaser shall be satisfied with an assignment from H.'s executors of the beneficial interest," was held not sufficient to preclude the purchaser from calling for an assignment of the legal estate; because so long as the legal estate was outstanding the vendors could not say they had the whole beneficial interest, and the condition did not bind the purchaser to take merely such beneficial interest as was vested in the vendors: *Smith v. Ellis*, 14 Jur. 682. Legal estate.

The condition "the purchaser shall bear the expense of tracing and getting in all outstanding legal estates (if any)," does not preclude the purchaser from requiring the vendor to get in the legal estate when it is traced, the purchaser bearing the cost. See *Freeland v. Pearson*, 7 Eq. 246. "Expense."

Condition that the purchaser "shall accept a conveyance of the entire property from the official manager of the said company, under the powers contained in the Joint Stock Companies Winding-up Acts, 1848 and 1849, or one of them, without requiring the concurrence of any of the shareholders or any other person for any purpose whatsoever, and the purchaser shall require no other covenant for title than a covenant by the official manager that he has done no act to incumber. If the purchaser shall consider the legal estate in the whole or any part of the property to be outstanding, and shall require a conveyance thereof, he shall bear the expenses of obtaining all such conveyances as he may require and all other expenses incidental to the getting in of such legal estate." This condition was held to entitle the vendor to compel payment of the purchase-money on tendering a conveyance by the official manager, and undertaking to obtain all such conveyances as the purchaser might require and as the vendor should be able to obtain, at the purchaser's expense, without waiting to trace the legal estate; the purchaser being entitled to the aid of the official manager in obtaining a conveyance of the legal estate whenever the pur-

chaser could succeed in tracing it, but not being entitled to delay completion because it was doubtful in whom the legal estate was outstanding: *Sheerness Waterworks Co. v. Polson*, 29 Beav. 70, affd. 3 De G. F. & J. 36.

Absence of condition.

On a sale by the Court, even in the absence of a condition to that effect, the purchaser will be compelled to take an equitable title without the legal estate "where the legal estate is outstanding, without any claim of interest on the part of the person in whom it is vested": per Shadwell, V.-C., in *Craddock v. Piper*, 14 Sim. 310. Some remarks of Lord Romilly, in *Freeland v. Pearson*, 7 Eq. 246, seem to limit this rule to the case where the legal estate is vested in an infant, or to cases where the Court sees that the legal estate can be got in.

(iv.) *Statutory declaration as to seisin, &c.*

Statutory declarations.

A condition that the purchaser "shall be satisfied with a declaration of the seisin of G. in fee simple, free from incumbrances," does not preclude the purchaser from requiring further evidence, if the only declaration offered is merely that the declarant had "heard and believed that G. became possessed of the premises as the sole and absolute owner thereof, in fee simple," making no mention of incumbrances: *Nott v. Riccard*, 22 Beav. 307, 313. A reference to a declaration made by A. B., without mentioning the fact that A. B. was not, from his position in life, likely to know the facts declared, would probably be held to be misleading. Thus, if A. B. were a bricklayer or labourer, and made a statutory declaration that X. was seised in fee simple, free from incumbrances, the declaration would not be worth much as evidence, and a condition that A. B.'s declaration should be sufficient evidence, not mentioning A. B.'s occupation, would probably not be held to be binding.

(v.) *Condition as to validity of a lease, subject to which the property is sold.*

Validity of lease.

On a sale of property subject to a lease, there was a condition, "all purchasers will buy subject to and admit the validity of the leases stated in the particulars." The particulars stated a lease dated 1876. On the investigation of the title there appeared a lease, dated 1850, for three lives, one of which was still in existence. No surrender of the lease of 1850 could be

found, but since 1866 no rent had been paid and no claim made thereunder. The purchaser objected to the title, and the Court held that he was not precluded by the condition, which, though binding him to admit the validity of the lease of 1876, did not bind him to admit the existence of every matter which might be a condition precedent to its validity: *King v. Chamberlayn*, W. N. 1887, p. 158.

(vi.) *Receipt for rent, evidence that covenants have been performed.*

Upon the sale of land held by lease, other than underlease, Receipt for rent. "on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase, the purchaser shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion of the purchase": Conveyancing Act, 1881, s. 3, part of sub-sect. (4).

Upon the sale of land held by underlease, Underlease. "on production of the receipt for the last payment due for rent under the underlease before the date of actual completion of the purchase, the purchaser shall assume, unless the contrary appears, that all the covenants and provisions of the underlease have been duly performed and observed up to the date of actual completion of the purchase; and further, that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date": Conveyancing Act, 1881, s. 3, part of sub-sect. (5).

Sub-sect. (4) does not apply to land held by lease at a pepper-corn rent, because such rent is not "paid," but "rendered": Peppercorn. *Re Moody and Yates*, 28 Ch. D. 661; 30 Ch. D. 344. The usual condition in such a case is that "*possession* under the lease shall be conclusive evidence, &c."

The statutory conditions differ from those used in practice in Criticism of statutory condition. two points: (1) the receipt is not made *conclusive* evidence of the performance of the covenants; (2) it is not made evidence that any breach of the covenants has been waived. They merely prevent the requisition, "Have the covenants been kept?" If the purchaser discovers a breach *aliunde*, they do not prevent his requisition, "Has the breach been waived?"

"Conclusive"
evidence.

A condition making the last receipt for rent *conclusive* evidence that all covenants had been performed up to completion, was held to preclude the purchaser from objecting that the covenant to repair had in fact not been performed: *Bull v. Hutchens*, 32 Beav. 615. See, however, p. 220 as to the force which ought to be given to the word "conclusive." But whatever effect should be given to this word, the addition of words making the receipt sufficient evidence of the waiver of any breach will preclude the purchaser from requiring evidence of waiver: *Howell v. Kightley*, 21 Beav. 331. But even if the condition makes the receipt conclusive evidence of the waiver of any breach, this would probably be insufficient to compel the purchaser to complete if it were proved that the landlord intended to enforce the forfeiture: *Ibid.*

Known
breaches.

If the vendor is aware of any particular existing breach which has not been waived, he ought to mention it. See Dart, p. 194; and see above, p. 213. If he does not mention it, the statutory conditions, and probably even the most stringent conditions, would not protect the vendor. Still less would they protect the vendor who wilfully (or inadvertently, *qu.*) broke the covenants after the contract for sale had been entered into. "Although the vendor has inserted in his condition that possession shall be deemed a waiver of all breaches 'up to the completion of the sale,' I think that it will not justify him in committing a forfeiture after the contract, entitling the landlord to enter, though the condition of sale may be sufficient to cure the defect up to the contract": Romilly, M. R., in *Howell v. Kightley*, 21 Beav. 331, at p. 336; approved by the Court of Appeal in *Laurie v. Lees*, 14 Ch. Div. at p. 260. Even a breach caused by the vendor's inadvertence or neglect would, it seems, not be covered by the condition if it occurred after the contract: *Ibid.* In that case the breach was that of the covenant to insure; the sale was made on the 24th of September, 1854, and the premium on the policy became due on the 29th of September, and the days of grace expired on the 14th of October, and nothing was paid until the 24th of October. It does not appear from the report whether the breach occurred through mere neglect, or through wilful default. But in *Laurie v. Lees*, 14 Ch. Div. 249, at p. 255, James, L. J., said that in *Howell v. Kightley* it was a wilful breach.

If the receipt is signed by a person who is not the original lessor, the purchaser may, it would seem, at all events if there has been a breach, require proof that such person is entitled to give the receipt. Person signing receipt.

"If a waiver, either express or made sufficient by the conditions, be relied on by the vendor, and the landlord giving it is a different person from the original lessor, a condition precluding investigation of the lessor's title will not preclude the purchaser from requiring the title to be traced from the original lessor to the person whose waiver of the breach of covenant is relied on:" Dart, p. 195, referring to an unreported case of *Turner v. Marriott*. Even where there has been no breach, yet if there is a reasonable doubt as to the person entitled to the reversion, much more if there is a certainty of litigation, the purchaser will not be compelled to complete: *Pegler v. White*, 33 Beav. 403. Statutory conditions receive a similar construction to conditions expressly used by the vendor. See p. 173.

On the sale of an underlease, the production of the ground-landlord's receipt for rent, which the vendor had paid him under a threat of distress for the ground-rent, is not "production of the receipt for the last payment due for rent under the underlease": *Re Higgins and Percival*, 59 L. T. N. S. 213. Underlease.

A condition making the receipt conclusive evidence of performance of covenants or waiver of breach up to the time of completion, applies to continuing breaches. In *Bull v. Hutchens*, 32 Beav. 615, there was a breach of a covenant to repair, and a condition simply making the receipt conclusive evidence of performance (omitting the words as to waiver) was held to be sufficient to preclude the purchaser from objecting to the breach. In *Howell v. Kightley*, 21 Beav. 331, the breach was held not to be covered by the condition, but the *ratio decidendi* was not that the breach was a continuing one, but that it was first committed after the sale was entered into. Continuing breaches.

The point is somewhat fully discussed in *Laurie v. Lees*, 14 Ch. Div. 249. The continuing breach there complained of was the breach of a covenant not to carry on, or permit to be carried on, on the premises any business except that of a licensed victualler. The effect of the condition was not actually decided,

because a judgment for specific performance had been made against the purchaser, and he had appealed, not from it, but from the order made on further consideration, after the inquiry as to title before the chief clerk. But the remarks of James, L. J., 14 Ch. Div. p. 257, of Bramwell, L. J., at p. 261, and of Lord Penzance, 7 App. Ca. p. 31, are in point. Bramwell L. J., says (p. 261), "It occurred to me that it might be unreasonable to make the purchaser take a conveyance, and pay the purchase-money, when all he would get would be a lease that might be avoided the day after he became possessed of it. . . . If such a difficulty as that which I have suggested could prevail, the condition in question would really be a nugatory stipulation, because the great majority of covenants are of such a character that a continuing breach may be committed *de die in diem*. It would be idle to say, you shall not require proof that the covenants have been performed, or you shall be content to admit that if they have not been performed they have been waived, if the purchaser could say, 'I am just as well off as though that clause was not there, because I am at liberty to say that if I complete, I may be turned out the next day, by reason of a continuing breach, the continuance of which I cannot prevent immediately after my purchase.' I think, therefore, that the purchaser ought not to be at liberty to set up such a case."

Other evidence.

In the absence of any condition as to the evidence of the performance of the covenants, &c., an affidavit by the vendor that to the best of his knowledge and belief the covenants have been performed, is sufficient evidence to entitle him to specific performance, unless the purchaser can adduce proof of the breach of the covenants: *Ringer to Thompson*, 51 L. J. Ch. 42. The refusal of the lessor to accept rent, and the commencement by him of an action of ejectment for the breach of the covenant to repair, which has been stayed in default of delivery of particulars of breach, is not sufficient proof to outweigh the vendor's affidavit: *Ibid*.

(vii.) *Registration*.

Registration.

A general condition providing that no objection shall be taken "on account of any document not being registered in the Middlesex Registry," is not misleading, even if the vendor knows

of the non-registration of any particular document. A purchaser was held bound by such a condition, though the will under which the vendors claimed had not been registered, and ten years had elapsed since the testator's death, and the name of his heir-at-law was not known, so that searches for conveyances by him could not be made: *Girling v. Girling*, W. N. 1886, p. 18.

(viii.) *Stamping.*

"Every condition of sale framed with the view of precluding Stamps. objection or requisition upon the ground of absence or insufficiency of stamp upon any instrument executed after the passing of this Act" (the 16th of May, 1888), "and every contract, arrangement, or undertaking for assuming the liability on account of absence or insufficiency of stamp upon any such instrument, or indemnifying against such liability, absence, or insufficiency, shall be void": Customs and Inland Revenue Act, 1888, sect. 20.

With regard to deeds executed before the 16th of May, 1888, In absence of condition. the purchaser is, in the absence of stipulation, entitled to have stamped at the vendor's expense all deeds forming part of the title during the statutory or stipulated period, except perhaps such deeds as are useless for the protection of the purchaser: *Smith v. Wyley*, 16 Jur. 1136.

Thus, a purchaser is entitled, on a contract for sale with a mortgagor, to require an insufficiently-stamped mortgage deed to be stamped at the vendor's expense, although the mortgagee was to join in the conveyance to the purchaser: *Whiting to Loomes*, 14 Ch. D. 822; 17 Ch. Div. 10. There the purchaser might have required the deed to show who the mortgagee was, and why he joined in the conveyance (per Pearson, J., 24 Ch. D. at p. 124), and also to protect himself against an incumbrancer of the equity of redemption: per James, L. J., 17 Ch. D. at p. 11.

But where a building society had conveyed to several allottees, Building society. and the latter had, on having their purchase-money refunded, reconveyed to the society by unstamped deeds, purchasers from the society, who were to get a conveyance from the society and the allottees, were held not entitled to require the deeds of

reconveyance to the society to be stamped: *Ex parte Birkbeck, &c. Society*, 24 Ch. D. 119. This was a case of compulsory sale, and the purchasers (the Conservators of Epping Forest) could have vested, and afterwards did vest, the property in themselves by a deed poll under the Lands Clauses Act, 1845, sect. 75.

(ix.) *Conditions respecting Tenancies, Easements, &c.*

Underleases. A condition precluding requisitions in respect of a specified underlease, "or of any underlease or tenancy prior to" a specified date, will not preclude requisitions in respect of an underlease made prior to the specified date, and not expressly mentioned in the conditions, but known to the vendor at the time of the sale: *Edwards v. Wickwar*, 1 Eq. 68. "It was the clear duty of the vendor to give the fullest information which he himself possessed as to the title. The object of special conditions of sale is to protect the vendor from inquiries which he cannot satisfy, and against objections which he cannot explain away. . . . Here it was plainly the duty of the parties to disclose the underlease, and it would be most mischievous to allow a vendor to suppress facts known to him affecting the title, and yet compel a purchaser to accept it": per Page-Wood, V.-C., *ibid.* See further as to leases, pp. 67, 68.

**Easements
known to
vendor.**

The ordinary condition with regard to easements does not protect the vendor against an easement, or claim to an easement, known to him or his solicitor who prepared the conditions, but only against those unknown to him at the time of the contract: *Heywood v. Mallalieu*, 25 Ch. D. 357, at p. 363.

**Easements
unknown to
vendor.**

It has even been said that the condition will not relieve the vendor from the necessity of disclosing liabilities of which he would have been aware if he had used the means of knowledge in his reach, *e.g.*, if he had perused his title-deeds: *Nottingham, &c. Company v. Butler*, 15 Q. B. D. at p. 271. In that case the condition made the property "subject to all tenancies and easements, and also subject to any matter or thing affecting the same, whether disclosed at the time of sale or not." There were restrictive covenants affecting the property, of which the vendor apparently was ignorant, but which he would have discovered by perusing his title-deeds.

It may be doubted whether this was not going too far; the condition is employed for the express purpose of enabling the vendor to neglect the examination of his title.

(x.) *Incumbrances.*

The mention of an incumbrance in the conditions is not sufficient to preclude the purchaser from requiring it to be paid off; it should be mentioned in the particulars. See p. 68. In *Torrance v. Bolton*, 14 Eq. 124; 8 Ch. 118, where this rule was laid down, the conditions were not annexed to the particulars; they were not printed or circulated, but merely read in the auction-room. Incumbrances.

The condition that "a statement in a specified deed that a life annuity granted to A. had not been paid or claimed for eight years previously, and a declaration by the vendor that he believes that the same has not been claimed for the last twenty years, shall be conclusive evidence of the fact of such annuity having determined," was held to be misleading, the fact being that the annuity was granted for four lives, two of which were subsisting, and the property, the subject of the sale, being a reversion, the annuity charged on it could not have been claimed during the periods mentioned in the condition: *Drysdale v. Mace*, 5 D. M. & G. 103.

CHAPTER XXVII.

IDENTITY.

(i.) *In the absence of Stipulation.*

Identity. If there is any variation between the description of the parcels in the documents of title, and the description contained in the particulars, or between the descriptions in the several documents of title *inter se*, the purchaser is, in the absence of stipulation to the contrary, entitled to evidence that the property sold is identical with or comprised in the parcels contained in the documents of title.

If the parcels are so loosely described in the documents of title as not to be capable of identification by means of the description alone, the purchaser may require evidence as to who was in possession of the property during the period covered by the abstract of title, but he cannot refuse to complete merely on the ground of the vagueness of the description in the documents of title. See *Long v. Collier*, 4 Russ. 267, which was a case of copyholds, where the descriptions on the Court Rolls usually are vague; but the same rule would probably apply to freeholds.

"Partly freehold." If the vendor describes the property as "partly freehold and partly leasehold," or "partly freehold and partly copyhold," he is under an obligation to show the purchaser the boundaries of the different kinds of land: *Monro v. Taylor*, 8 Ha. 51, at p. 66. The purchaser cannot, in such a case, complain if the freehold portion is less than he expected; all he can complain of is uncertainty as to the boundaries: *Ibid.*

Plan. The parcels in a lease were described by reference to a plan on the margin, which purported to be drawn to a scale of one chain to an inch, and gave the outline of the parcels, and stated

that they contained 2 roods; measured by the scale the plan showed that the parcels contained about $2\frac{1}{2}$ roods. On a sale of the leasehold parcels, together with the adjacent freeholds, the purchaser objected that the quantity of leaseholds was uncertain. The objection was disallowed on the ground that the lease afforded the materials for ascertaining the quantity of the leasehold parcels: *Monro v. Taylor*, 3 Mac. & G. 713. The decision would have been the same even if it had been of the utmost importance to the purchaser that the leaseholds should be 2, and not $2\frac{1}{2}$, roods, as all the vendor had represented was, that the estate was partly freehold and partly leasehold: *Ibid.*, p. 720.

(ii.) *Conditions as to Identity.*

A condition that "no further evidence of identity shall be required than that afforded by the abstracted documents," will not preclude the purchaser from requiring evidence of identity if the documents do not afford evidence of identity; as for instance, if the descriptions given in the documents vary from the particulars or from each other: *Flower v. Hartopp*, 6 Beav. 476, and *Curling v. Austin*, 2 Dr. & Sm. 129.

Conditions.
No evidence
in deeds.

A condition, however, that "the quantities of the land shall be taken as stated, whether more or less, although the title-deeds state such quantities to be less," and that "no other evidence of identity shall be required than that furnished by the documents of title, and the statements contained therein shall be conclusive evidence of identity," was held to preclude the purchaser from objecting that the abstract showed title to 3 roods, 22 perches only, the property being described in the particulars as 1 acre, 2 roods, 8 perches: *Nicoll v. Chambers*, 11 C. B. 996 (but *qu.*?).

Deficiency in
parcels in
title deeds.

A condition that "the estate as to extent of acreage, and other matters of description, shall be taken as conclusively shown and defined by certain specified deeds without further evidence," will not preclude the purchaser from complaining of the inaccuracy of a statement made to him by the vendor as to the quantity. Such a condition is "no more than a conveyancing provision as to identity, that the estate sold, represented as consisting of 1,530 acres, should, as to its extent of acreage and other matters of description, be taken to be conclusively identi-

Misdescrip-
tion as to
acreage.

fied by the title-deeds": per Lord Cairns in *Aberaman Works v. Wickens*, 4 Ch. App. 101, at p. 105.

Identification impossible.

A condition that a certain plot "cannot be properly identified by the vendor . . . but it is fairly presumed that the purchaser, by inquiry in the vicinity, will be able to ascertain the true situation, and he is to accept this plot by the description only contained in the conveyance deed of it," is insufficient if the purchaser's inquiries turn out to be unsuccessful: *Robinson v. Musgrove*, 2 Moo. & R. 92.

Freeholds and copyholds mixed.

On a sale of adjacent freeholds and copyholds, the condition that "the purchaser shall not be entitled to have it shown how much is freehold and how much copyhold," binds the purchaser for all purposes of the sale, and a stipulation that the timber on the property is to be taken at a specified valuation is covered by the condition, so that the purchaser cannot object that he does not know how much of the timber is on copyhold land: *Crosse v. Lawrence*, 9 Ha. 462. In that case, the sale of the land and timber was one entire contract, and the vendor's duty of making out his title to the timber was limited by the condition. If the sale of the timber had been a separate contract, he would have been obliged, in the absence of further stipulation, to show that it stood on the freehold portion of the property, as otherwise the purchaser would not be sure of having a right to fell and remove it.

On a contract of sale of a house and land described as "freehold, except about eight acres, which are copyhold, but undistinguished, except as to not including any of the buildings," after the abstract of title had been delivered, a supplemental agreement was entered into detailing what requisitions should be complied with, and amongst others the following requisition: "Declaration of identity of lands mentioned in deeds to those now sold." It was held, that the meaning of this requisition was that the purchaser was to be supplied with evidence that the lands sold were comprised either as freehold or as copyhold in the title produced, but that the vendor was relieved from the duty imposed on him by the original contract of proving that the buildings were not on the copyhold portion: *Dawson v. Brinckman*, 3 Mac. & G. 53.

On the sale of land described as containing 227 acres, 50 thereof copyhold, and the rest freehold, a condition that the vendor shall not be required to distinguish the copyholds from the freeholds, and that no compensation shall be made if the copyholds exceed 50 acres, will not preclude the purchaser from objecting to the title, if he discovers *aliunde* that the copyholds are very much more than 50 acres: *Turquand v. Rhodes*, 37 L. J. Ch. 830.

A condition that "a statutory declaration of the possession or receipt of rents for thirty years and upwards according to the title declared, or of the identity of the premises shall be deemed sufficient evidence of seisin or identity," will not preclude the purchaser from requiring better evidence if the vendor has it; and the purchaser may insist on an affidavit by the vendor that the declaration is the best evidence he can give: *Bird v. Fox*, 11 Ha. at p. 48. ^{Better evidence.}

CHAPTER XXVIII.

DELIVERY OF ABSTRACT—WAIVER OF REQUISITIONS.

Abstract. THE vendor is bound to deliver an abstract of title, in the absence of any condition to the contrary; delivery of the title-deeds is not enough: Sug. 406. The purchaser, though bound to accept the title, may still require an abstract. See p. 225, above.

Time. Though a time is fixed in the conditions for the delivery of the abstract, the vendor's default does not necessarily entitle the purchaser to rescind, time not being regarded as of the essence of the contract, unless made so by express stipulation, by the nature of the property, or the circumstances of the case: *Roberts v. Berry*, 3 D. M. & G. 291; and see pp. 271 to 274.

If the vendor fails to deliver the abstract within a reasonable time after the date fixed (or, if no date is fixed, within a reasonable time after the sale), the purchaser may rescind. In *Venn v. Cattell*, 27 L. T. N. S. 469, the condition stipulated for delivery of the abstract within twenty-one days, and the abstract was not delivered until 118 days after the sale; this was held to be an unreasonable delay, and one justifying the purchaser in rescinding.

Waiver as to time. But if the purchaser fails to return an abstract delivered too late, he would probably be held to have waived his right to rescind on account of such lateness of delivery (see *Seton v. Slade*, 7 Ves. 265, at p. 278); unless he has received the abstract "without prejudice": cf. *Tilley v. Thomas*, 3 Ch. App. 61; and see p. 257. And it would seem that a purchaser who neglects to ask for the abstract within a reasonable time before the day fixed for its delivery, cannot object to the lateness of delivery: *Guest v. Homfray*, 5 Ves. 818, 823.

Where the stipulation was that the abstract should be delivered immediately, and that, if the purchase were not

completed by the day specified, the purchaser should be released, and the abstract was not delivered immediately, and communications on the subject of the title continued after the day fixed for completion, the purchaser was held to have waived the benefit of the stipulation as to time: *Hipwell v. Knight*, 1 Y. & C. Ex. 401, at p. 419.

In construing conditions requiring the purchaser to make his requisitions within a given time "after the delivery of the abstract," the words "delivery of abstract" are taken to mean the delivery of a perfect or sufficient abstract: *Upperton v. Nickolson*, 6 Ch. 436 (decided also in *Hobson v. Bell*, 2 Beav. 17; *Blacklow v. Laus*, 2 Ha. 40). By a perfect abstract is meant the most perfect abstract in the vendor's possession (actual or constructive) at the time of delivery: *Morley v. Cook*, 2 Ha. pp. 111, 112, 114. See also *Oakden v. Pike*, 34 L. J. Ch. 620; *Parr v. Lovegrove*, 4 Drew. 170. An abstract is not imperfect or insufficient because it shows that the vendor's title is defective, or that he has no title at all. Thus, in *Blackburn v. Smith*, 2 Ex. 783, 789, the abstract was held sufficient, although it showed that the vendor had not a full sixty years' title. An insufficient or imperfect abstract means an abstract which does not truly or sufficiently abstract the deeds purporting to be abstracted, or which does not abstract the whole of the muniments of title (covering, at least, the period fixed by law, or by the contract, for length of title) in the vendor's custody, power, or knowledge, or does not state the facts (with dates) of deaths, births, &c., material to the title. It is not necessary, in order to perfect the abstract, that it should have been compared with the documents themselves. See *Blackburn v. Smith*, 2 Ex. 783; *Oakden v. Pike*, 34 L. J. Ch. 620.

In abstracting a deed or will, the limitations and uses should be accurately stated; if there are any trusts, they should be stated; all modifications, by proviso or otherwise, should be accurately stated. See Sug. 408, 410.

A deed or will is sufficiently abstracted (for the purpose of entitling the vendor to say that an objection is waived) even though all the clauses thereof are not set out, provided that the clauses on which the objection is founded are set out. In

"Abstract" means "perfect abstract."

Definition of "perfect abstract."

Documents, how to be abstracted.

Clause objected to sufficiently abstracted.

Oakden v. Pike, 34 L. J. Ch. 620, the vendor deduced his title from a devise in a will to "the sons of R. O. (if he should leave any), to the eldest son, and, if he should die without male issue, then to his second son, and to all his sons severally and successively, according to their respective seniority in tail male," and a disentailing deed executed by R. O. and his eldest son. The purchaser sent in an objection (beyond the specified time) that the estate in tail male of the eldest son was contingent on the event of his surviving his father. The will contained a residuary devise (which was not abstracted) to R. O. in fee. Kindersley, V.-C., held that the will was sufficiently abstracted for the purpose of raising the objection taken by the purchaser, and that the objection, being too late, was to be held waived.

Examples.

A statement in the abstract of a will, that trustees are to sell and hold the produce "upon the trusts for the children of F. S., as therein mentioned," is sufficient to call on the purchaser to make the requisition as to what those trusts are: *Want v. Stallibrass*, L. R. 8 Ex. 175.

An abstract of a marriage settlement, omitting the covenant to settle after-acquired property, which alone affected the subject of the sale, was held to be insufficiently abstracted: *Burnaby v. Eq. Reversionary Int. Soc.*, 54 L. J. Ch. 466.

A document is not sufficiently abstracted if it contain a material clerical error, even though in a subsequent document there is a recital fully abstracted, correctly setting forth the previous document: *McCulloch v. Gregory*, 1 K. & J. 286, at p. 292.

Burden of proof.

The *onus* of proving that the abstract delivered by the vendor is not perfect lies on the purchaser: *Ward v. Ghrimes*, 9 Jur. N. S. 1097.

Damages.

The purchaser may recover damages (if he has suffered any) in consequence of the vendor's breach of contract to deliver a perfect abstract, but it is improbable that a purchaser should suffer damages through such a breach: *Gray v. Fowler*, L. R. 8 Ex. 249, at p. 282. In *Steer v. Crowley*, 14 C. B. N. S. 337 (where, however, it was said the vendor was not bound to give a perfect abstract), one shilling damages was given, because the abstract first sent was misleading. The purchaser may get

damages (if any) resulting from the vendor's false representation that the abstract is perfect : *Gray v. Fowler*, *ubi sup.*

In *Gray v. Fowler*, L. R. 8 Ex. 249, at p. 265, there are some remarks of Lord Bramwell which seem to lay down that if the abstract is imperfect, and the purchaser makes a requisition on a defect not disclosed by the abstract, the vendor loses the right of rescission given him by the condition for rescission. This, it is submitted, cannot be supported; the delivery of a perfect abstract, though a condition precedent to the acquisition by the vendor of a right to disregard requisitions not sent in within the time fixed, is not a condition precedent to the exercise by the vendor of his right to rescind.

Condition
enabling
vendor to
rescind.

Waiver of Requisitions.

I. In the absence of Stipulation.

In the absence of stipulations as to the time within which requisitions are to be sent in, the purchaser may waive his right to object to the title (i.) by a release in writing or parol; (ii.) by taking steps towards completion without insisting on the defect; (iii.) by taking possession; (iv.) by exercising rights of ownership; (v.) by completing the purchase.

(i.) Release.

The right to object to the title may be released by writing or parol; a mere notification that the title is satisfactory is enough. And even without expressly releasing the vendor, the purchaser may, by his correspondence or conversation, give the vendor to understand that he has no intention of disputing the title, and in that case will be held to have lost his right to object to the title. Thus, where a purchaser who had taken possession kept the abstract more than a year without making any objections, and wrote to the vendor apologising for not paying the purchase-money, he was held to have waived his right to object to the title : *Margravine of Anspach v. Noel*, 1 Madd. 310.

Release.

Acceptance of title to freeholds and copyholds, subject to the vendor furnishing a "declaration of identity of lands mentioned in deeds to those now sold," amounts to a waiver of the right to have the freeholds and copyholds distinguished from each other : *Dawson v. Brinckman*, 3 Mac. & G. 53. See p. 246.

(ii.) *Taking steps towards completion.*Taking steps
to complete.

Tendering a draft conveyance may be evidence of waiver. Thus, a purchaser of leasehold property who made other requisitions, but did not inquire as to the lessor's title, and who sent the draft conveyance to the vendor, was held to have waived his right to proof of the lessor's title: *Clive v. Beaumont*, 1 De G. & Sm. 397. A purchaser who forwarded the draft conveyance, without prejudice to the requisitions, was held to have waived his right to object to the title, as the only requisition not answered to the purchaser's satisfaction was one relating to the payment of the purchase-money: *Sweet v. Meredith*, 8 Jur. N. S. 637.

Where the purchaser took possession, retained the abstract for five months without objection, and, on being required by the vendor to complete within fourteen days, merely asked for production of title-deeds, this was held to amount to waiver: *Pegg v. Wisden*, 16 Beav. 239.

Where the purchaser, knowing at the time of the defect in title, and not insisting on its removal, gave notice to the vendor to complete, this was held to be waiver: *Macbryde v. Weekes*, 22 Beav. 533.

Continuing to
treat.

The purchaser does not, by merely continuing to treat after knowledge of a defect, waive his right to object to the title on account of such defect. Thus, where the purchaser objected to a defect in the title, and continued to treat for five months, insisting that his requisitions had not been answered, but not specifying the objection in question, which was not one of the formal written requisitions, he was held not to have waived his right: *Hughes v. Jones*, 3 D. F. & J. 307.

(iii.) *Taking possession.*Taking
possession.

Taking possession with the knowledge and consent of the vendor is not in itself sufficient evidence of waiver. If the conditions provide that possession shall be taken at an earlier date than that fixed for completion, the possession is explained as a carrying out of a part of the agreement, and not, therefore, an acceptance of the title. See *Margravine of Anspach v. Noel*, 1 Madd. 310.

Even though the conditions do not provide for possession,

taking possession, though with the vendor's consent, amounts to a presumption of an acceptance of the title, and the *onus* of proof lies then on the purchaser (*Boirn v. Stenson*, 24 Beav. 631), who may rebut the presumption by showing that the possession was not intended to have that effect. The fact that the purchaser raises and insists on objections to the title will rebut the presumption. See *Hyde v. Warden*, 3 Ex. Div. 72 (a case of an agreement to grant an underlease).

If a purchaser knows that there are defects in the title which the vendor cannot remove, and making no objection thereto takes possession of the property without being authorized by the conditions to enter into possession before completion, he waives his right to object to such irremovable defects: *Re Gloag and Miller's Contract*, 23 Ch. D. 320. If the defect is removable, the purchaser does not necessarily waive his right to have it removed: *Ibid*.

Knowledge
of irremov-
able defects.

A restrictive covenant affecting the property, and enforceable by third persons, is an irremovable defect: *Ibid*. So, too, is a right of sporting over the property vested in some third person over whom the vendor has no control: *Burnell v. Brown*, 1 J. & W. 172.

Instances of
irremovable
defects.

A mortgage is a removable defect.

Where the contract provided that the abstract, if required, should be paid for by the purchaser, retention of possession for two years without asking for an abstract was held to be sufficient evidence of waiver of the right to examine the title: *Sibbald v. Lowrie*, 18 Jur. 141.

Not asking
for abstract.

Taking possession and declining to discuss the title are sufficient evidence of waiver: *Hall v. Larer*, 3 Y. & C. 196.

Taking possession forcibly, or without the vendor's knowledge, amounts to waiver if the conditions do not provide for possession: *Calcraft v. Roebuck*, 1 Ves. jun. 221 (see below, on partial waiver).

Forcible or
secret posses-
sion.

(iv.) *Exercising rights of ownership.*

If the purchaser is under the conditions entitled to possession before completion, unimportant alterations made by him in the property, *e. g.*, filling up a pond, levelling, removing an osier plantation, do not prove waiver of the right to object to the

Exercising
rights of
ownership.

title: *Osborne v. Harrey*, 1 Y. & C. C. C. 116. But even with such a condition, making alterations in and letting the property go far towards proving waiver. See *Margravine of Anspach v. Noel*, 1 Madd. 310.

Insisting on having good title.

In the absence of such a condition, unimportant acts of ownership (such as making a cesspool) are evidence of an acceptance of title, which is rebutted by the fact that the purchaser insists on objections to the title all the time: *Hyde v. Warden*, 3 Ex. Div. 72.

Offering for sale.

Offering for sale, though not in itself sufficient to prove waiver, is a fact which tends to strengthen other evidence of waiver. See *Simpson v. Sadd*, 4 D. M. & G. 665.

Mortgaging.

The purchaser of the benefit of an agreement for a lease of a public-house who took possession without objecting to the title, paid part of the purchase-money and mortgaged his interest, was held to have waived his right to object to the title: *Haydon v. Bell*, 1 Beav. 337.

Leasing.

The granting of a lease by the purchaser is not conclusive evidence of waiver (*Ex parte Sidebotham*, 1 M. & A. 655, at p. 661); but a purchaser who grants a lease, intending to give the lessee possession, will probably be held to have waived objections of which he was aware: *Ibid.*

Partial or Conditional Waiver.

Conditional waiver.

A purchaser may waive an objection conditionally, or may waive one objection and reserve his right to insist on other objections, or may accept the title so as to preclude himself from rescinding without precluding himself from demanding compensation.

Requisitions.

Waiver of the right to deliver requisitions does not preclude the purchaser from insisting on the verification of the abstract: *Southby v. Hutt*, 2 My. & Cr. 207.

Abstract.

Waiver of the right to an abstract does not preclude the purchaser from making requisitions in respect of defects which he discovers without an abstract: *Sidebottom v. Barrington*, 3 Jur. 947.

One objection.

Insistence on one objection, and silence as to another, does not necessarily amount to waiver of the second objection: *Magennis v. Fallon*, 2 Moll. 561, at p. 576. But on a purchase

of freeholds and copyholds, acceptance of the title subject to the production of a "declaration of identity of lands mentioned in the deeds to those now sold," is a waiver of the right to have the freehold distinguished from the copyhold: *Dawson v. Brinckman*, 3 Mac. & G. 53.

Acceptance of title or waiver of requisitions does not necessarily import a waiver of a right to compensation: *Calcraft v. Roebuck*, 1 Ves. jun. 221. The purchaser loses his right to rescind, but does not necessarily waive his right to compensation: *Hughes v. Jones*, 3 D. F. & J. 307, at p. 316. Right to compensation.

Where on a sale in Court a misdescription was discovered before completion, and compensation claimed under the condition, and the purchaser accepted a conveyance with a correct description, he was held not to have waived his right to compensation, and the purchase-money being still in Court compensation was allowed thereout: *Re Perriam*, 32 W. R. 369.

An acceptance of title does not debar the purchaser from objecting to a defect of which he was ignorant, and which ought to have appeared on the abstract, but did not: *Bousfield v. Hodges*, 33 Beav. 90. Unknown defect.

II. Conditions with respect to Requisitions.

If a time is fixed for the delivery of the abstract, and the abstract is not delivered within such time, the condition requiring the purchaser to send in his requisitions within a given time will not be binding, and the purchaser will be allowed a reasonable time for sending in requisitions, or (*qu.*) a corresponding period after the delivery of the abstract. Time fixed for abstract.

It makes no difference if the condition as to sending in requisitions contains a stipulation that time shall be of the essence of the contract, and no such stipulation is contained in the condition as to the delivery of the abstract: *Upperton v. Nickolson*, 6 Ch. 436. Time of the essence.

"It seems to me reasonable and just that if the vendor does not himself comply with the terms specified, in that case the time for taking the objections and the mode in which they are to be considered as waived should depend upon the general principles of the Court": per James, L. J., *ibid.*, p. 443.

Imperfect abstract.

If the abstract, though delivered within the period fixed, is imperfect, the purchaser must send in his requisitions within a corresponding period after the abstract is made perfect: *Hobson v. Bell*, 2 Beav. 17. But requisitions on points disclosed by the first imperfect abstract must probably be sent in within the time fixed, the extension of time only applying to points arising on the new abstract or answers to requisitions: *Ward v. Ghrimes*, 9 Jur. N. S. 1097; and see *Morley v. Cook*, 2 Ha. 106, at p. 112.

If the purchaser discovers a defect in the title sufficiently serious to make the title bad or doubtful, which should have been, but was not, either disclosed by the abstract or mentioned in the conditions, the stipulation as to sending requisitions within a given time will not preclude him from objecting to the title on the ground of the undisclosed defect: *Warde v. Dixon*, 28 L. J. Ch. 315.

Further requisitions.

The condition requiring the purchaser to send in his objections within a given time does not preclude the purchaser from taking an objection which arises out of evidence called for before the expiration of the time fixed: *Blacklow v. Laurs*, 2 Ha. 40. The purchaser will, it seems, be allowed a corresponding period after the production of the evidence. See *Hobson v. Bell*, 2 Beav. 17, and *Morley v. Cook*, 2 Ha. 106, at p. 112.

Title wholly bad.

The condition, that objections, if not taken in time, are to be considered as waived, does not bind the purchaser to complete where the title is wholly bad. Thus, in *Want v. Stallibrass*, L. R. 8 Exch. 175, where the vendors, who were devisees in trust for sale after the death of F. S., sold during the lifetime of F. S., and this defect appeared on the abstract, but was not objected to by the purchaser within the time fixed by the conditions, it was held that the purchaser could rescind and recover his deposit. See also, *Tanqueray-Willaume and Landau*, 20 Ch. Div. 465, at pp. 473, 474. But in *Oakden v. Pike*, 34 L. J. Ch. 620, Kindersley, V.-C., held that, the purchaser being too late, the question whether the title was good did not arise; that, however, was a case of *doubtful* title only. See p. 256. In *Rosenberg v. Cook*, 8 Q. B. Div. 162, the condition was enforced although the vendor had only a short possessory title.

Where the conditions of sale mask a defect in the title in *Bona fides*. such a way as to show want of *bona fides* in the vendor, the condition making time essential for the sending in of requisitions will not be enforced against the purchaser, especially if the title is radically bad and the time given short compared with the length of the abstract: *Boyd v. Dickson*, 10 I. R. Eq. 239, at p. 255.

In any case of fraud, or of "common mistake" where the purchaser is relieved after completion, the purchaser would be relieved from the condition as to requisitions. See *Jones v. Clifford*, 3 Ch. D. 779, and *Price v. Macaulay*, 2 D. M. & G. 339, 347. Fraud and
"common
mistake."

The vendor waives his right to treat requisitions as waived, if he receives and entertains requisitions after the time fixed, without expressly reserving his right under the condition: *Oakden v. Pike*, 11 Jur. N. S. 666. Waiver by
vendor.

On a sale by the Court, a purchaser was allowed to rescind, on the ground of a defect in title not sufficiently disclosed by the abstract, even after he had paid the purchase-money into Court, and even though, but for the negligence of his solicitor the defect might have been discovered in time: *McCulloch v. Gregory*, 1 K. & J. 294. After pay-
ment of pur-
chase-money.

CHAPTER XXIX.

COMPENSATION.

- (i.) *Conditions allowing Compensation to the Purchaser.*
- (ii.) *Conditions refusing Compensation to the Purchaser.*
- (iii.) *Conditions allowing Compensation to the Vendor.*

(i.) *Conditions allowing Compensation to the Purchaser.*

Effect of
condition for
compensation.

A CONDITION allowing compensation to the purchaser has apparently no effect upon the mutual rights of the vendor and purchaser, except in the three cases mentioned below : pp. 260—263.

Fraud or
essential mis-
description.
Non-essential
misdescription.

The purchaser may, notwithstanding the condition, rescind if the misdescription was fraudulent, or in an essential matter ; the vendor may enforce the contract with compensation if the misdescription was non-essential, either under the condition, or under his general right ; and the purchaser may, either under the condition, or under his general right, enforce the contract with compensation, even though the misdescription was one which would be usually considered essential, provided compensation can be assessed. See the rules laid down at p. 97. The cases as to fraud and essential misdescription will be found set out at length at p. 83 and p. 105 respectively. The following authorities are cited merely to show that the same principle applies where there has been a condition for compensation :—

The condition “was meant to guard against unintentional errors, not to compel the purchaser to complete the contract if he had been designedly misled” : *Duke of Norfolk v. Worthy*, 1 Camp. 337.

“I think that such a condition applies to accidental slips, but not to a case like the present, where, though I do not mean to

impute actual fraud, there is what in the view of a Court of Equity amounts to fraud—a misrepresentation calculated materially to mislead a purchaser”: per Turner, L. J., in *Dimmock v. Hallett*, 2 Ch. App. 21, at p. 29.

“Where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract, that it may be reasonably supposed that, but for such misdescription, the purchaser might never have entered into the contract at all; in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation”: per Tindal, C. J., in *Flight v. Booth*, 1 Bingh. N. C. 370, at p. 377.

In *Wright v. Wilson*, 1 Moo. & R. 207, Parke, B., thought that if the misdescription had originated in error, a condition for compensation in case of a “mistake in the description of the premises, or any other material error in the particulars of sale,” would prevent the purchaser from rescinding, however gross the negligence of the vendor had been, and however important the error was to the purchaser. But this is contrary to the general tendency of the authorities.

On the sale of a reversion expectant on the death of A. (a man), without children, A. was described as being 66 years old, being in reality only 64. It was held that this error did not come within the condition, because such an error affected the probability of the contingency of the birth of children, which was not a subject of calculation: *Sherwood v. Robins*, Moo. & Mal. 194.

The extent to which certain undisclosed easements affected the property, the importance of the easements, and the fact that the vendor had been negligent in the performance of his duty, were considered as having weight in determining whether the condition for compensation applied or not: *Shackleton v. Sutcliffe*, 1 De G. & Sm. 609.

A condition for compensation for errors or misstatements, does not entitle the purchaser to compensation for a false estimate innocently made by the vendor of the annual value of the property, where such annual value is expressly stated to be “estimated”: *Re Hurlbutt and Chaytor*, 57 L. J. Ch. 421.

There is in such a case no misstatement, unless the vendor made a dishonest estimate, *i. e.*, did not really "estimate" the property at the value mentioned in the particulars. It might, however, be said that there is an "error," *viz.*, an error in the estimate itself.

Construction. It is to be observed that in all the above, and in most of the older, cases, the rule that the Court will allow the purchaser to rescind if the misdescription is essential, is put as a question of construction; but the fact is the Court simply puts the condition on one side. See p. 263, as to the condition that no compensation shall be allowed. That it is not a question of construction would seem clear from the fact that where the purchaser desires to enforce the condition, the essentiality of the misdescription is not taken as showing that the condition was not meant to apply: thus, in *Painter v. Newby*, 11 Ha. 26, an essential defect of title, *viz.*, the absence of a right of renewal of a lease, was held to be within the condition. See further, p. 172.

**Exceptions to
above rule.**

(1) After
completion.

The three exceptions referred to at p. 258, are the following:—

(1.) In the absence of stipulation the purchaser cannot, after completion, obtain compensation for any defect. See Chapter XX. p. 158. But a condition allowing compensation to the purchaser will be enforced even where the error has not been discovered until after completion, unless the condition is expressly limited to errors discovered before completion. This, notwithstanding some conflicting decisions, may be taken as having been settled by the cases of *Bos v. Helsham*, L. R. 2 Ex. 72; *Re Turner and Skelton*, 13 Ch. D. 130; and *Palmer v. Johnson*, 12 Q. B. D. 32; 13 Q. B. Div. 351. The most important decision to the contrary is *Manson v. Thacker*, 7 Ch. D. 620, a decision of Malins, V.-C., who took the opportunity in *Allen v. Richardson*, 13 Ch. D. 524, of expressing his approval of his own view, and his disapproval of that of Jessel, M. R., in *Re Turner and Skelton*, *supra*. The reasons given for the decision in *Bos v. Helsham*, *supra*, are—(1) that the condition was inserted in order to avoid any inquiry involving delay into the value of the property or its rental; (2) that it could easily have been limited to errors before completion, if that had been the vendor's intention; and (3) that the execution of the convey-

ance would not preclude the parties, because there was an express contract between them from which the right to sue sprang. An additional reason is given in *Re Turner and Skelton*, 13 Ch. D. 130, viz., that where the error is one of quantity the purchaser could not, by due diligence, discover it before completion, except by the permission of the vendor, which permission the vendor is not bound to give. The principle laid down in *Leggott v. Barrett*, 15 Ch. Div. 306, at pp. 309, 311, that when an executory contract is afterwards reduced into a deed, the former merges, and the rights of the parties are determined wholly by the deed, is inapplicable, because the conveyance is intended to carry out only a part of the contract for sale, and is not designed to supersede the contract for compensation.

Where the defect complained of is a mere defect in title, and the vendor has not made any misstatement on the point, nor concealed it in the preparation of the abstract of title, the condition for compensation does not apply. Thus, in *Ex parte Riches*, 27 Sol. J. 313, where the vendor had only a life estate in part of the property, but sold as absolute owner, the Court of Appeal held that a condition for compensation in case any "error, misstatement, or omission," should occur, did not apply, as this was a mere defect in title. The condition as to requisitions would naturally cover the case of a defect in title, but even apart from this the purchaser, upon completion, is precluded from objecting to the title, and has no remedy except under his covenants for title (if any). Defect in title.

Where the condition for compensation is only in respect of any "deficiency in the acreage or dimensions," it is conceived that the purchaser would not, after completion, be able to obtain compensation for any other error, *e.g.*, a misstatement of the rental. Deficiency in "acreage."

If the condition embraces in terms only "errors and misstatements," or "misdescriptions," a question might arise whether a mere omission would be within the condition. The actual decision in *Manson v. Thacker*, 7 Ch. D. 620, might, perhaps, be upheld on the ground that the non-mention of the hidden culvert was an "omission," and not an "error" or "mis- Omission.

statement," and that the condition did not expressly include "omissions." See, as to the distinction between omissions and positive misdescriptions, Chapter II., p. 18.

(2) Condition
for rescission.

(2.) Where there is the usual condition for rescission, the right of the vendor to enforce that condition may be affected by the fact that the contract contains a condition allowing compensation to the purchaser. In the absence of any condition as to compensation, the purchaser's demand for compensation would, like any other requisition, enable the vendor to rescind under the condition for rescission. If there is a condition for compensation, and an error covered by that condition is admitted or clearly proved by the purchaser, the vendor will have to give compensation, and cannot rescind on the ground of unwillingness to comply with the purchaser's requisition. This subject is more fully treated in Chapter X. on the Condition for Rescission.

(3) Defect
known to
purchaser or
guarded
against by
conditions.

(3.) The third exception to the general rule is one the existence of which is extremely doubtful; but it is inserted in deference to the authorities mentioned below. It is this, that where the defect is known to the purchaser at the date of the contract (and therefore one for which he can obtain no relief, see above, p. 207), or is one which the purchaser is, by the conditions, precluded from objecting to, the condition for compensation will nevertheless enable him to obtain compensation. The authorities for this very disputable proposition are the opinions of Kay, J., in *Lett v. Randall*, 49 L. T. N. S. 71, and of Bacon, V.-C., in *English v. Murray*, 49 L. T. N. S. 35. In the former case, the vendors had described the property as let on lease for seventy-five years from 1850, the fact being that the term commenced in 1858, and would therefore last eight years longer than was thought. Kay, J., expressed his opinion that the purchaser did not actually know the description was wrong, but added that even if he did, the vendors were bound to give compensation, because their contract was, "We will sell our property for so much, and part of our contract is, that if we have misstated anything in the conditions of sale, you shall have compensation for that misstatement." The argument (see the judgment) that the purchaser had paid a higher price owing to the misdescrip-

tion, because even if the purchaser knew of the mistake, the other bidders did not, and being influenced by the description, bid higher than they would otherwise have done, seems fallacious. If the purchaser had chosen, he could have asked for information as to the defect at the auction, which, being given to him openly, would have opened the eyes of the other bidders. Either the purchaser was content to give the price he offered, in which case he wanted no compensation because he had suffered no damage, or he paid more in the expectation of obtaining compensation, in which case he committed a fraud on the vendors. In the case of *Camberwell and South London Building Society v. Holloway*, 13 Ch. D. 754 (see p. 762), Jessel, M. R., held that a purchaser who had notice that property described as a lease was only an underlease, was not entitled to compensation under a condition allowing compensation "if any error or mistake shall appear in the description or in the nature or quality of the vendors' interest therein." And though the word "lease" was only ambiguous, and therefore no actual misdescription had occurred, the principle of the case is certainly at variance with the opinion of Kay, J., in *Lett v. Randall*. The second part of the proposition above set out is even more doubtful, but is founded on *English v. Murray*, where a condition, which was held to be sufficient to preclude the purchasers from rescinding on the ground of a defect in the vendors' title, was, in the opinion of Bacon, V.-C., not sufficient to preclude them from demanding compensation under the condition for compensation. But it is to be observed that the vendors there, both before the action and at the hearing, conceded the purchasers' right to compensation, the only point for the Vice-Chancellor's decision being, whether the purchasers were entitled to rescind.

(ii.) *Conditions refusing Compensation to the Purchaser.*

A condition that there shall be no compensation cannot be relied on by the vendor as enabling him to compel the purchaser to complete without compensation, if there has been an essential misdescription (see p. 102), or if the vendor has been guilty of fraud in the matter.

Conditions
refusing
compensation.

In the older decisions, the rule is stated as a rule of construc-

Construction.

tion. Thus, in *Whittemore v. Whittemore*, 8 Eq. 603, Malins, V.-C., says: "Conditions of this kind must be construed as intended to cover small unintentional errors and inaccuracies, but not to cover reckless and careless statements." But it is not, properly speaking, a question of construction; it is rather a principle of equity, that, notwithstanding the conditions of sale, the vendor shall not have specific performance if he have materially misled the purchaser. See the judgments of Lord Esher, M. R., and Cotton, L. J., in *Terry and White*, 32 Ch. Div. 14.

"More or less."

In *Portman v. Mill*, 2 Russ. 570, a farm of 249 acres was described as "containing by estimation 349 acres, or thereabouts, be the same more or less," and there was a stipulation that the parties should not be answerable for any excess or deficiency in the quantity, and that such excess or deficiency should not vacate or affect the contract, but that the premises should be taken at the quantity stated, whether more or less. The Court was of opinion that such a clause would not cover so large a deficiency.

Defects in title.

The words "error in the description of the property" are to be construed as referring to misdescription of the physical property, and do not include mistakes in the description of the vendor's title. Where the vendor sold an underlease under the description of "lease," the condition, "the description of the property in the particulars is believed to be correct, but if any error shall be found therein, the same shall not annul the sale, nor shall any compensation be allowed the vendor or purchaser in respect thereof," was held to be insufficient to preclude the purchaser from rescinding: *Beyfus and Masters*, 39 Ch. Div. 110.

"An intending purchaser could satisfy himself by inspection whether the physical property had been described with sufficient accuracy, and we ought not to extend a condition of this kind to misdescription, which he could not discover till he received the abstract of title": per Bowen, L. J., *ibid.*

Inconsistent conditions.

In *Whittemore v. Whittemore*, 8 Eq. 603, property containing 573 square yards was described as containing 753 square yards. It was a sale under a decree, and there were two conditions relating to compensation, one that no compensation should be

allowed in respect of errors as to quantity, and another providing for compensation "except as to matters in respect whereof the right to compensation is hereby excluded." The Court held that the purchaser was entitled to compensation.

See, for other instances where the contract has been rescinded or compensation given notwithstanding the condition, *Heywood v. Mallalieu*, 25 Ch. D. 357 (an undisclosed easement affecting the property sold); *Nottingham Patent Brick Co. v. Butler*, 16 Q. B. Div. 778 (restrictive covenants).

The condition may, however, be so framed as to inform the purchaser of the true state of the facts, and preclude him from objecting thereto or requiring compensation. Thus, a condition that "the quantities of the land shall be taken as stated, whether more or less (although the title deeds state such quantities to be less), without any equivalent or compensation on either side," was considered sufficient to preclude the purchaser from requiring compensation or rescinding, although the property was described as containing 1 a. 2 r. 8 p., and the title deeds gave the quantity as 3 r. 22 p. only: *Nicoll v. Chambers*, 11 C. B. 996.

A condition that there shall be no compensation, though it may be inadequate to enable the vendor to insist on specific performance *without* compensation, will be sufficient to preclude the purchaser from insisting on specific performance *with* compensation.

As against such a claim, the condition is, to use the language of the older decisions (see on this point, p. 172), construed in accordance with the ordinary rules of construction. That is to say, the construction of the condition varies according as the purchaser's demand is for rescission, or for completion with abatement. Thus, in *Cordingley v. Cheeseborough* (31 L. J. Ch. 617, at p. 620), Lord Westbury says, "No doubt it is a very wholesome maxim that a vendor shall be required to bring into the market particulars and conditions of sale, prepared with great care and fairness, and when the vendor is the plaintiff for a specific performance, that rule is, in my judgment, properly enforced as against the vendor. But when the purchaser insists that the terms of this contract give him a right to a

Sufficient
condition as
to acreage.

Purchaser
seeking
specific
performance.

Construction.

deduction, claiming still to have the benefit of the contract, the rule to which we have been referred is no longer applicable, and the contract must be construed according to the ordinary terms of construction, for the purpose of ascertaining whether he is or is not entitled to the deduction from his purchase-money." In *Terry and White* (32 Ch. Div. 14), Lord Esher, M. R., says that a purchaser could not, in the face of such a condition, insist upon completion with compensation, because (p. 24) "he has contracted that if the contract is to go on, he shall not have any compensation for a misdescription of quantity." In that case, as well as in *Cordingley v. Cheeseborough*, there was also a condition for rescission, which made the vendor's position still more secure.

The misdescription complained of in *Cordingley v. Cheeseborough*, 4 De G. F. & J. 379; 31 L. J. Ch. 617, was that land containing 4,350 square yards only, was described as containing 7,683 square yards.

In *Phillips v. Miller*, L. R. 10 C. P. 420, reversing 9 C. P. 196, the purchaser was allowed compensation notwithstanding this condition; but this was in pursuance of a subsequent agreement between the vendor and purchaser entered into at the time of completion. See p. 204 of the report in 9 C. P.

Inconsistent conditions.

The purchaser's right to compensation, under a condition allowing compensation in case of an "error or misdescription," is not precluded by a condition that "the purchaser of lot 2 shall not object to complete his purchase if the quantity should turn out less than that stated in the particulars": *Frost v. Brewer*, 3 Jur. 165.

Rental.

Where, however, there was no condition allowing compensation, the condition "no purchaser shall be entitled to object by reason of any slight error or misdescription in the rental, as to the quantity of land, rent-tithe, rent-charge, or otherwise," was held to be sufficient to preclude a purchaser from demanding specific performance with abatement of the purchase-money in respect of a misstatement of the valuation of the property, whereby the purchaser was deceived as to the proportion of taxes payable by him. The valuation being 80*l.* was described as 67*l.*, and the taxes payable by the purchaser were 1*l.* 8*s.* 2*d.*

annually more than they would have been on a valuation of 67*l.*: *Ex parte Guinness*, 5 L. R. Ir. 616.

(iii.) *The Vendor's Right to Compensation.*

(1) *In the absence of stipulation.*

The law as to the vendor's right to compensation, in the absence of stipulation, does not appear to be settled. Compensation to vendor.

From *Okill v. Whittaker*, 2 Ph. 338, it would seem that in the absence of stipulation the vendor is never entitled to compensation. But the cases cited p. 77, above, support the view that in a case of hardship, as, for instance, where the land sold largely exceeds the acreage stated in the particulars, and the purchase-money has been calculated by both the vendor and the purchaser on the footing of acreage, the vendor will be entitled to rescind, or, at all events, the purchaser will be unable to insist on completion without an increase of the purchase-money.

(2) *Condition allowing compensation to the vendor.*

The usual form of this condition is one in which a right to compensation is conferred on both vendor and purchaser. Condition allowing compensation to vendor, must be clear.

A condition to enable the vendor to obtain compensation, must state definitely that the vendor is to receive compensation. A vague stipulation that "compensation shall be made," or that "the error shall be the subject of compensation," is not enough. In *Re Orange to Wright*, 54 L. J. Ch. 590, the condition was that "if any mistake or omission be made in the description of the property, the same shall not vitiate the sale, but a compensation or allowance shall be made"; and it was held that the vendor was not entitled to compensation under this condition because the property turned out to be larger than described.

The effect of a condition allowing compensation to the vendor would seem to be as doubtful as the law itself is in the absence of stipulation. On the whole the tendency of modern decisions being to let the parties make their own contracts, the condition would probably be enforced. Effect doubtful.

The only case known to the author in which compensation has been allowed to the vendor under such a condition is *Leslie v. Thompson*, 9 Hare, 268. There property had been sold in lots, the acreage of one lot was more than that given in the particulars,

and the acreage of three other lots was less than the description. The order made was: Declare the purchaser bound to make compensation in respect of lot (1), and entitled to receive compensation in respect of lots (2), (3), and (4). The excess in lot (1) was greater than the aggregate deficiency in lots (2), (3), and (4); so the vendor probably obtained an increase of the purchase-money.

The remarks of Turner, V.-C., in that case, p. 273, show that what was actually decided was that, in the face of a condition allowing compensation to the vendor, the purchaser cannot enforce specific performance without compensation; his only remedy is rescission.

This leaves it doubtful whether the vendor could *enforce* the condition for compensation; *i.e.*, could compel the purchaser to complete giving compensation, when the purchaser would prefer to rescind.

Large excess. If the excess is very large, the purchaser would, it is conceived, be allowed to rescind if he preferred it notwithstanding the condition. Thus, in *Price v. North*, 2 Y. & C. Ex. 620, the vendor described his property as containing 14 acres, whereas it really contained 27 acres. The Court held that the purchaser could not be compelled to pay additional purchase-money, chiefly on account of the vendor's delay, but also because "such a misdescription would not be ground for modifying the contract but for avoiding the sale altogether." The wording of the condition in that case (that an error "should be the subject of compensation") would appear to be too vague to be enforced. See p. 267.

To what errors the condition applies.

A condition that errors, &c. "shall not annul the sale, but a compensation shall be given or taken," was construed as referring only to such errors "as on the part of the vendors would vitiate or annul the contract for sale," in other words such as would entitle the vendor to rescind: per Turner, V.-C., in *Leslie v. Thompson*, 9 Ha. 268, at p. 273. Whether the vendors would have been entitled to rescind in that case the learned judge considered doubtful, though he was disposed to think that as they had acted with ordinary prudence and had made the mistake through relying on a surveyor's report, they would be

entitled to be relieved. But, it is conceived, the carefulness of the vendors does not really affect the question whether they are entitled or not to enforce their condition for compensation, at all events, to the extent of preventing the purchaser from being entitled to specific performance without giving compensation.

Where property having a frontage of 69 feet 6 inches was described as "about 63 feet frontage," the Court considered this was not such a misdescription as to entitle the vendor to compensation under a condition that in case of any error, misstatement, or misdescription, the same should not annul the sale, but compensation should be given or allowed: *Bourne v. London, &c. Co.*, W. N. 1885, p. 109.

As to the provision that the amount of compensation shall be Valuation. ascertained by valuation, see above, p. 185.

CHAPTER XXX.

CONDITIONS RELATING TO COMPLETION.

(i.) *Construction.*

"Completion," what.

COMPLETION means, as against the purchaser, the payment of the purchase-money; as against the vendor, the execution and delivery of the conveyance after showing a complete title according to the contract. "Completion means the delivery of the conveyance on the one side, and the payment of the purchase-money on the other": Romilly, M. R., in *Hudson v. Temple*, 29 Beav. 536, at p. 543.

In a condition of sale, "completion" would mean as against the purchaser, payment of the purchase-money to the vendor, if the vendor were ready to complete, or, if not, such payment or appropriation as the circumstances allowed. Thus, where the purchasers (a railway company) agreed to pay interest "up to and inclusive of the day on which the said purchase shall be completed," and, the vendor not being ready, paid the purchase-money into Court, this was held to be completion on their part, so as to absolve them from payment of interest subsequent to the payment into Court: *Lewis v. South Wales Ry. Co.*, 10 Ha. 113. So, as against the vendor, "completion" means a willingness and readiness to convey, having previously shown a complete title: *Tilley v. Thomas*, 3 Ch. 61. If, by the contract, the purchaser is to have possession, the vendor's title is not complete unless he can give possession: but see below, p. 294.

(ii.) *Time.*

Time.

The conditions usually fix a date for completion.

"28th Dec. next."

A contract, dated 15th December, fixed "the 28th of December next" as the date for completion; this was construed as

meaning the next 28th of December, not the 28th of next December: *Daves v. Charsley*, W. N. 1886, 37, 78.

Where a day was fixed for "possession," but no day was fixed "Possession." for completion, a condition providing for the return of the deposit, "in the event of the sale not being completed," was held to refer to the day fixed for possession: *Tilley v. Thomas*, 3 Ch. 61.

Where the conditions stipulated that the purchase-money was Payment. to be paid "on or before the 28th November," but did not fix any time for completion by the vendor, it was held that the vendor was not bound to complete on the 28th November: *Sansom v. Rhodes*, 8 Scott, 544.

If no time is fixed for completion, a reasonable time is (and No time even at law was) allowed: *Sansom v. Rhodes*, 8 Scott, 544. fixed.

The conditions may make time essential. If so, the default Time made of the purchaser in paying the purchase-money will entitle the vendor to rescind at once, and the default of the vendor in essential by making a good title by the time fixed for completion will conditions. entitle the purchaser to rescind.

Time will be essential if the conditions provide that "time shall be of the essence" (*Lloyd v. Ripplingale*, 1 Y. & C. Ex. at p. 410); or that "if from any cause the purchase be not completed by" the day fixed, "the vendor shall be at liberty to annul the contract" (*Hudson v. Temple*, 29 Beav. 536); or that "the contract shall be void if not performed by (the day fixed)" (*Hudson v. Bartram*, 3 Mad. 440); or that "if the title shall not be perfected within the time aforesaid, the purchaser shall be released from his contract": *Hipwell v. Knight*, 1 Y. & C. Ex. 401.

So time is made of the essence by an agreement that if the purchase-money is not paid by a given day, "or upon such deferred date as the parties may agree upon, the contract shall be void": *Barclay v. Messenger*, 43 L. J. Ch. 449.

If, in the conditions, the vendor makes time of the essence in Essential in some matters, the Court will be more inclined to regard time as essential in other matters against the vendor: *Seaton v. Mapp*, 2 Coll. 556.

But in favour of the purchaser the Court regards a condition

making time essential in respect of one matter; *e. g.*, sending in requisitions, as raising a presumption that time was not intended to be essential as regards completion generally: *Wells v. Maxwell*, 32 Beav. 408.

Instalments. Where the purchase-money is to be paid by instalments, and time is made of the essence of the contract, every default by the purchaser in payment of an instalment gives the vendor a new right to rescind: *Hunter v. Daniel*, 4 Ha. 420.

Essential against purchaser. If time is made of the essence of the contract as against the purchaser, it would probably be held to be of the essence as against the vendor. Where time is of the essence, the vendor cannot obtain damages for the purchaser's repudiation of the contract, unless the vendor himself was ready to complete on the day fixed. See *Noble v. Edwards*, 5 Ch. Div. 378.

Vendor's negligence. The vendor cannot take advantage of a condition making time of the essence, or giving him the right to rescind "if from any cause whatever the purchase is not completed by the day fixed," if he has himself been guilty of gross negligence or improper conduct. It is the duty of a person who has sold property under such a condition, to do all he can to make out his title: *Hudson v. Temple*, 29 Beav. 536.

Time essential through circumstances. Time is of the essence, where the nature of the property or the surrounding circumstances are such that it must have been the intention of the parties that time should be essential.

Essential for vendor— Time is of the essence on account of the vendor:

(a) **Reversion;** (a) On the sale of a reversion: *Neuman v. Rogers*, 4 Bro. Ch. C. 391. For no man sells a reversion who is not distressed for money, and the purchaser who delays completion has an unequal advantage, because he brings the reversion nearer to its enjoyment without increasing the purchase-money: see note by Belt on that case.

(b) **Mortgage debt;** (b) Where the vendor, to the purchaser's knowledge, requires the money by a certain day for the purpose of paying off a mortgage: *Taylor v. Stibbert*, cited 2 Sch. & Lef. 604.

(c) **Lease by fluctuating body;** (c) On an agreement for a lease, where the lessors are a fluctuating body, and part of the consideration for the lease is a fine, because in that case if completion is delayed, the persons who receive the benefit under the contract may differ from

those who actually contracted: *Carter v. Dean of Ely*, 7 Sim. 211.

(d) On the sale of the vendor's interest in a public-house sold as a going concern, where the vendor is a tenant from year to year; because the vendor incurs a fresh liability, and the value of the property may diminish: *Costake v. Till*, 1 Russ. 376. (d) Public-house;

(e) Time is essential where the property sold is of wasting or fluctuating value. (e) Wasting property.

Thus, in the case of mines, on an agreement for a lease, time is of the essence (per Lord Eldon, in *City of London v. Mitford*, 14 Ves. at p. 58), even though no time is named: *Macbryde v. Weekes*, 22 Beav. 533. Mining lease.

So, on the sale of a life annuity: *Withy v. Cottle*, T. & R. 78. Annuity.

Or of a leasehold whereof only a short term remains unexpired: *Hudson v. Temple*, 29 Beav. 536, at p. 543. Short lease.

Time is of the essence on account of the purchaser—

Time essential for purchaser.

(a) On the sale of a public-house as a going concern: *Cowles v. Gale*, 7 Ch. 12. (This is also decided in *Day v. Luhke*, 5 Eq. 336; *Claydon v. Green*, L. R. 3 C.P. 511; and *Weston v. Savage*, 10 Ch. D. 736.) (a) Public-house.

(b) Where the property is intended for the purposes of trade, as on an agreement for a lease of a coal mine, &c.: *Parker v. Frith*, 1 S. & S. 199, n. (b) Business.

(c) On the sale of a dwelling-house when the purchaser intends to reside there, provided the vendor knows of the purchaser's intention: *Tilley v. Thomas*, 3 Ch. 61. If the vendor does not know of the purchaser's intention, and there is nothing in the contract to show that the purchaser intended to reside in the house, the purchaser's intention will not be sufficient to make time essential: *Boehm v. Wood*, 1 J. & W. 419, at p. 422. Time is not necessarily of the essence if the purchaser does not require the house for his own immediate occupation: *Dyer v. Hargrave*, 10 Ves. 508. Nor is time necessarily of the essence on a sale of land for building a dwelling-house: *Wells v. Maxwell*, 32 Beav. 408. (c) Residence.

(d) On the sale of an agreement for a building lease where the time for completing the building is limited: *Brewer v. Broadwood*, 22 Ch. D. 105. (d) Building lease.

Intention of parties.

But in a sale where, on account of the subject-matter, the Court would hold time to be essential, the conditions, and especially a condition for the payment of interest, may show that this was not the intention of the parties, and in that case neither party will be held bound to complete on the day fixed.

Provision for interest.

Thus, on the sale of a house required (as the vendor knew) for residence, a condition provided that "if from any cause whatever the purchase should not be completed on the day fixed, the purchaser should pay interest on the purchase-money:" this stipulation was held to show that time was not essential: per Malins, V.-C., in *Webb v. Hughes*, 10 Eq. 281, 286.

"Without prejudice."

And even where the condition as to payment of interest by the purchaser is made without prejudice to the vendor's right under another condition, viz., that "the deposit shall be forfeited if the purchaser fails to comply with the conditions," the condition for payment of interest shows that time is not meant to be essential: *Patrick v. Milner*, 2 C. P. D. 342 (sale of contingent reversion).

Time not essential.

If time is not made of the essence by the contract, or by the nature of the property or circumstances, the Court will relieve against a failure to keep the date assigned by the contract for completion if it can do justice between the parties: *Roberts v. Berry*, 3 D. M. & G. 284; see, too, *Seton v. Slade*, 7 Ves. 265; 2 L. C. 501, 5th ed. This, the old rule of the courts of equity, is now the rule in all the Divisions of the High Court of Justice by virtue of the Judicature Act, 1873, sect. 25, sub-s. 7. See *Hove v. Smith*, 27 Ch. Div. 89, at p. 103.

Reasonable time allowed.

The Court will in such a case allow a reasonable time for completion after the stipulated day.

Thus, where the contract was entered into on the 24th March, and completion was fixed for the 24th April, the vendor not to re-sell for six weeks after the 24th April, and on the 20th June the vendor, after pressing for completion, agreed to extend the time for completion for a month, it was held that the expiration of that month was the latest time at which the purchaser could compel the vendor to accept the purchase-money and complete: *Hove v. Smith*, 27 Ch. Div. 89.

If it is quite clear that the vendor has no title at all, or that his only title is contingent on the volition of a third person, the purchaser may rescind at once, and, it would seem, even before the time fixed for completion. "When a person sells property which he is neither able to convey himself, nor has the power to compel a conveyance of it from any other person, the purchaser, as soon as he finds that to be the case, may say, 'I will have nothing to do with it'": per Romilly, M. R., in *Forrer v. Nash*, 35 Beav. 171, cited with approval by Fry, J., in *Brewer v. Broadwood*, 22 Ch. D. 105 (where, however, time was of the essence).

Where vendor has no title.

Where the vendor described the property as "in the occupation of C., at a rental of 42l.," the fact being that C. held adversely to the vendor, and an ejectment action would be necessary to enable the vendor to give the purchaser possession, the Court refused to give the vendor further time, and allowed the purchaser to rescind: *Lachlan v. Reynolds*, Kay, 52.

Where the vendor was a tenant for life selling under the Settled Land Act, 1882, and trustees of the settlement under the Act were not appointed until a month after the time fixed for completion, this was held to be a defect in conveyance, and not in title, and the purchaser was held to be unable to rescind: *Hatten v. Russell*, 38 Ch. D. 334.

If before the purchaser attempts to rescind the vendor acquires a good title, the purchaser then loses his right to rescind. See *Wylson v. Dunn*, 34 Ch. D. 569.

Although time was not originally of the essence of the contract, yet if one party has been guilty of delay, the other party may, by means of a notice, make time of the essence: *Taylor v. Brown*, 2 Beav. 180. But the right to make time of the essence by giving notice does not arise unless the other party has been guilty of delay. "You cannot make a new contract at the will of one of the contracting parties": per Fry, J., in *Green v. Serin*, 13 Ch. D. 589, 599.

Subsequent notice making time essential.

The notice should distinctly state that if the notice is not complied with, the party sending it will rescind; the mere statement "if you make default (on the day specified) I shall consider you as refusing to perform your agreement, and act

Form of notice.

accordingly," is insufficient: *Reynolds v. Nelson*, 6 Madd. 18. The words "in default of, &c., I shall consider the agreement at an end," are sufficiently explicit: *Macbryde v. Weekes*, 22 Beav. 533.

Must fix
reasonable
time.

The time fixed in the notice must be reasonable, having regard to the amount of work to be done and to the previous conduct of the person sending the notice. For instance, sufficient time must be allowed by the vendor for the verification and examination of the abstract, for sending in requisitions, the engrossment of the conveyance, &c., if these have not been done. Five weeks' notice by the vendor is unreasonably short if the abstract of title is complicated, and the requisitions have not been sent in, especially if the five weeks occur in the Long Vacation: *Crawford v. Toogood*, 13 Ch. D. 153. A fortnight's notice by the purchaser was insufficient when the vendor, in order to complete his title, had to find a deed which was lost: *Parkin v. Thorold*, 16 Beav. 59. A week's notice by the purchaser was insufficient where the vendor had to inquire very minutely into the circumstances of his birth in order to prove his legitimacy: *King v. Wilson*, 6 Beav. 124.

Two months' notice by the purchaser was held unreasonable where the vendor was doing all in his power to remove defects in title which it required more than two months to remove: *Wells v. Maxwell*, 32 Beav. 408.

Nature of
property.

In the case of property of such a nature that if a time had been fixed in the contract the Courts would hold time to be of the essence, the notice fixing a date for completion need not give the same length of time as in the case of other property. Thus, in *Macbryde v. Weekes*, 22 Beav. 533, a contract to grant a mining lease, one month's notice was held sufficient, though the defaulting party, the intending lessor, had not yet delivered the abstract or prepared the lease.

When reason-
ableness of
notice is
determined.

The reasonableness of the notice is determined as at the date when the notice is given: *Crawford v. Toogood*, 13 Ch. D. 153. The time previously consumed in negotiations, though relevant on the point of the conduct of the giver of the notice, is not taken into account in deciding the question whether the notice was long enough for the performance of the acts required to be

done. Thus, in *Crawford v. Toogood*, the purchaser's solicitors had had the abstract more than three months before the vendor's notice, fixing five weeks for completion, was sent. In *McMurray v. Spicer*, 5 Eq. 527, negotiations had lasted more than three years before the notice was sent. If, however, the defaulting party has consumed the time in attempting to perform the act, the non-performance whereof delays the sale, the time so consumed by him previously to the notice is taken into account in determining whether sufficient time has been given him to perform that act, or is treated as proving the uselessness of giving him further time. Thus, ten days' notice to the vendor to procure the execution of the conveyance by the necessary parties, was held sufficient, the vendor having already delayed completion two months in a fruitless endeavour to effect this. See *Benson v. Lamb*, 9 Beav. 502, where, however, there was an express agreement that if the vendor should be unable to obtain the concurrence of the requisite parties, each party to the contract should be at liberty to rescind it at ten days' notice. A fortnight's notice was held sufficient where the purchaser had required the vendor to furnish a certain declaration, and he had positively refused to furnish it: *Nott v. Riccard*, 22 Beav. 307.

The reasonableness of the notice depends not merely on its length and the work still to be done, but on the conduct of the party giving the notice. Thus, a notice by the vendor was considered unreasonable, partly because he had previously left unanswered an inquiry by the purchaser as to when the vendor was likely to complete: *Green v. Sevin*, 13 Ch. D. 589. So, too, a great delay by the vendor makes it unreasonable in him to give a short notice. Thus, where the vendor had delayed two years, and then required the purchaser to complete in three weeks, this notice was considered unreasonable: *Green v. Sevin*, 13 Ch. D. 589. A great delay by the vendor renders it justifiable for the purchaser to invest his purchase-money in such a way as to make it less accessible than it ought to be, and would be if such delay were not to take place: *Ibid.* Six weeks' notice by the vendor was held unreasonable, as the vendor had himself taken more than six weeks to deliver the abstract: *Pegg v. Wisden*, 16 Beav. 239, at p. 244.

Conduct of
person giving
notice.

Where the vendor gives notice, he must see that there is nothing left to be done on his part; *e.g.*, a supplemental abstract to be sent, questions as to the concurrence of mortgagees in the conveyance to be answered.

Waiver of
essentiality of
time—

The right to insist on completion by a given date may, whether time was originally of the essence or made so by notice, be waived either—(1) by express agreement; or (2) by conduct.

(1) By express
agreement;

(1.) *Waiver by express agreement.*

The right is waived *pro tanto* where a second date is fixed for completion. But the substituted time is of the essence, if time was originally essential. "A mere extension of time and nothing more is only a waiver to the extent of substituting the extended time for the original time, and not an utter destruction of the essential character of the time": Jessel, M. R., in *Barclay v. Messenger*, 43 L. J. Ch. 449, disapproving of the opinion of Romilly, M. R., in *Parkin v. Thorold*, 16 Beav. 59.

(2) By
conduct.

(2.) *Waiver by conduct.*

If the time for completion is once allowed to pass, and the parties continue the negotiations, time is no longer of the essence (*Webb v. Hughes*, 10 Eq. 281, 286), unless the negotiations are expressly "without prejudice" to the right to rescind: *Tilley v. Thomas*, 3 Ch. 61. Such a protest may give the negotiations the character of a treaty for the renewal of a rescinded contract rather than the continuation of an uninterrupted and subsisting contract. See *Southcomb v. Bishop of Exeter*, 6 Ha. 213, 219.

If the purchaser informs the vendor, or the vendor's agent, that he cannot complete by the time fixed, and the vendor or his agent makes no objection, this amounts to waiver: *Carpenter v. Blandford*, 3 Man. & Ry. 93.

The vendor waives his right to insist on time being essential if he, after the time fixed for completion, treats the contract as subsisting, *e.g.*, by asserting a claim to rent under the agreement: *Hudson v. Bartram*, 3 Madd. 440.

If the purchaser receives and retains, without any protest, an abstract which shows the title to be in such a state that the vendor will necessarily be unable to complete within the time

fixed, the purchaser waives his right to insist on time being essential: *Hipwell v. Knight*, 1 Y. & C. Ex. 401, at p. 419.

If the purchaser "goes on contesting the title without a protest against the delay, then the waiver is clear": *Magennis v. Fallon*, 2 Moll. 561, at p. 576.

If the purchaser goes on with the purchase after being informed that the vendor's title depends on the result of a pending Chancery suit, instead of calling for his deposit on the expiration of the time fixed for completion, this amounts to waiver: *Pincke v. Curteis*, 4 Br. C. C. 329, at p. 331.

Allowing the deposit to remain in the hands of the vendor is not conduct amounting to waiver on the purchaser's part: *Southcomb v. Bishop of Exeter*, 6 Ha. 213, at p. 224, referring to *Watson v. Reid*, 1 Russ. & Myl. 236.

Similarly, the omission of the vendor to return the deposit to the purchaser would not seem to amount to a waiver on the vendor's part, so as to invalidate his notice making time of the essence. See Sug. 269, commenting on *Reynolds v. Nelson*, 6 Madd. 18.

Notwithstanding any previous waiver, time may, it is conceived, be made essential by notice fixing a future and reasonably long time for completion.

(iii.) *Payment of Interest on Purchase-money.*

In the absence of stipulation, the purchaser, if in default, must pay interest on the purchase-money: *Acland v. Gaisford*, 2 Madd. 28. As to the time from which interest is payable, see below, p. 285; as to the rate of interest, see below, p. 288.

If the vendor is in default, he cannot claim interest, unless there is an express stipulation. If interest at 4l. per cent. exceeds the rents and profits, the Court will leave the defaulting vendor in possession of the interim rents and profits, instead of giving him interest on the purchase-money. If interest at 4l. per cent. is the same as, or less than, the rents and profits, then, in the absence of agreement, the vendor receives interest from the day of completion, and the purchaser takes the rents and profits as from that date. See *Esdale v. Stephenson*, 1 S. & St. 122.

An agreement that the purchaser shall have the rents and

Interest on
purchase-
money.

Vendor in
default.

profits "from the 29th September, provided the purchase should be then completed, but if the same should be settled either previously or subsequently to that period, then the purchaser should be entitled to such rents and profits from the time of such settlement," takes the case out of the ordinary rule that the vendor is entitled to the interest, and the purchaser to the rent, and no interest is payable in such a case: *Brooke v. Champernowne*, 4 Cl. & F. 589, at p. 611.

Form of
condition.

The conditions may make interest payable (a) in the case of "the purchaser's default"; (b) if the delay arises "from any cause whatever"; (c) if it arises "from any cause other than the vendor's wilful default"; or (d) may make interest payable *simpliciter*, without mentioning the cause of the delay; or (e) other conditions may be used.

(a) "Purchaser's default."

(a) *Condition making interest payable if delay arises "through purchaser's default."*

A condition making interest payable if the delay arises "through the purchaser's default," merely gives the vendor the right which he would have had in the absence of stipulation.

In *Perry v. Smith*, 1 Car. & M. 554, there was a condition that, in case completion should be delayed "on the part of the purchaser" beyond the 27th June, the purchaser should pay interest. On the 27th June the vendor and his trustee were ready to complete, but the purchaser was not. On the 28th November, the purchaser was ready, but the vendor was in default, because his trustee would not join. The purchaser was only compelled to pay interest for the period during which he was in default, viz., from the 27th June to the 28th November.

The condition, "if, *from any cause whatever*, the purchase-money shall not be paid (on the fixed date) the purchaser *making default* shall pay interest," is a condition under this head, and not under (b). Where such a condition was used, the purchaser was not compelled to pay interest when the delay was due to the state of the vendor's title: *Denning v. Henderson*, 1 De G. & Sm. 689 (a sale by the Court).

(b) "Any cause whatever."

(b) *Condition making interest payable if delay arises "from any cause whatever."*

This condition, and condition (c), making interest payable if

delay arises "from any cause whatever, other than the wilful default of the vendor," both have the same effect. Interest will be payable, even though it exceed the rents and profits (*Tewart v. Lawson*, 3 Sm. & G. 307), whether it is the purchaser who is in default or the vendor, unless the default of the latter is wilful. Dart, indeed, says (see p. 719), that condition (c) is stronger than condition (b), "since the particular exception of wilful default increases the stringency of the first part of the sentence." But there is practically no distinction in the effect of the two conditions (see below, p. 283), which might be put under the same heading if it were not thought more convenient, for purposes of reference, to separate them.

The condition, "under no circumstances shall the purchaser be excused from paying interest from that day until payment of the purchase-money," receives the same construction as the condition "from any cause whatever": *Rowley v. Adams*, 12 Beav. 476.

Under condition (b) the purchaser has had to pay interest in the following cases:—

Where the delay was caused by the purchaser taking an untenable objection: *Storry v. Walsh*, 18 Beav. 559.

Where the delay was caused by an act of God, viz., the vendor's death: *Bannerman v. Clarke*, 3 Drew. 632.

Where, on a sale subject to the approbation of the Court, delay was caused by the conveyancing counsel: *Tewart v. Lawson*, 3 Sm. & G. 307.

Where the delay was caused by the necessity of instituting a suit for the rectification of the power under which the vendor was selling: *Lord Palmerston v. Turner*, 33 Beav. 524.

Where the vendor had to institute a partition action: *Williams v. Glenton*, 1 Ch. 200.

Condition (b) does not entitle the vendor to interest if the delay is caused by his own fraud or wilful default: *Vickers v. Hand*, 26 Beav. 630. If the delay is caused by the state of the title, and is not wilful, that falls within the provision of "any cause whatever": *Sherwin v. Shakspear*, 5 D. M. & G. 517, at p. 528.

It rests with the purchaser to show sufficient cause to take

Burden of
proof.

him out of the provisions of condition (b). See *Williams v. Glenton*, 1 Ch. 200, at p. 208.

"Wilful default" is explained below, p. 283.

*De Visme v.
De Visme.*

In *De Visme v. De Visme*, 1 Mac. & G. 336, where the vendor's default in delivering the abstract had caused the delay, the purchaser was held liable to pay interest only from the time a good title was shown. The vendor there had bound himself to deliver the abstract within a certain time, and had failed to do so. The delay therefore arose from the non-performance of an act which the vendor had stipulated to perform. It was considered (*Ibid.* p. 351) that the words "from any cause whatever," could not include the failure by the vendor to perform an express stipulation, because the parties did not contemplate a breach of the contract by either of them.

De Visme v. De Visme was considered as deciding that, notwithstanding the condition "from any cause whatever," the purchaser is only liable to pay interest from the time a good title is shown. This is the view taken and followed in *Robertson v. Skelton*, 12 Beav. 363. If so, *De Visme v. De Visme* conflicts with the cases above mentioned, and, as Lord Langdale, M. R., said in *Rouley v. Adams*, 12 Beav. 476, at p. 478, "it is necessary that that case" (*De Visme v. De Visme*) "should be acted on with some caution." This caution may perhaps be shown by limiting the decision in *De Visme v. De Visme* to the case of the vendor's default in delivering an abstract where the contract fixes a date for such delivery. The purchaser would then be allowed the same period after the delivery of the perfect abstract as is given by the conditions, and would only have to pay interest from a period after the delivery of the perfect abstract, corresponding to the period allowed by the contract to elapse between the delivery of the abstract and the day from which interest was to run. This, or something like this (the facts being complicated by a substituted agreement), was the course adopted in *Sherwin v. Shakspear*, 5 D. M. & G. 517.

In *Vickers v. Hand*, 26 Beav. 630, Romilly, M. R., held that *De Visme v. De Visme* had been overruled by *Sherwin v. Shakspear*.

Sometimes, in a sale by the Court, the order directing the

purchaser to pay interest, in a case where the delay is caused by the state of the title, is made without prejudice to the purchaser's right to apply for compensation on the ground of expense caused by the state of the vendor's title: *Greenwood v. Churchill*, 8 Beav. 413 (where the vendor did not send a perfect abstract within the time fixed).

Even though, owing to the state of the title, the purchaser may be justified in rescinding, yet the purchaser, if he elect to complete, will have to pay interest: *Williams v. Glenton*, 1 Ch. 200 (where more than nine years elapsed before the vendor was ready to complete).

(c) *Condition making interest payable, if completion is delayed "from any cause whatever, except the wilful default of the vendor."* (c) "Any cause except vendor's wilful default."

Under such a condition the purchaser must pay interest, although the delay is caused by the state of the vendor's title: *Oxenden v. Lord Falmouth*, Sug. 637.

The word "wilful" in such a condition implies an action of "Wilful." the vendor's will. Nothing blamable is denoted; "it amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent": per Bowen, L. J., in *Young and Harston's Contract*, 31 Ch. Div. 168, 175. "Wilful" means spontaneous, not arising from the pressure of external circumstances: *Elliott v. Turner*, 13 Sim. 477. *Ex parte Bradshaw*, 16 Sim. 174; *Re Windsor, &c. Railway Act*, 12 Beav. 522, and other cases which decide that the words "wilful refusal" in the Lands Clauses Consolidation Act, 1845, s. 80, mean a refusal arising from caprice, are not in point.

The word "default" means merely not doing what is reasonable under the circumstances—not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction: *Young and Harston's Contract*, 31 Ch. Div. 168 (per Bowen, L. J.). "Default."

Refusing to enter into litigation with an adverse claimant is not wilful default: *Williams v. Glenton*, 1 Ch. 200 (where condition (b) was used). Refusing litigation.

Where two days before the time fixed for completion the vendor left England without having executed the conveyance, Leaving England.

which was ready for his execution on the afternoon of the day fixed, the vendor was held to have committed a wilful default: *Young and Harston's Contract*, 31 Ch. Div. 168. In that case the conveyance had also to be executed by two mortgagees, who were out of town in different places. The vendor's solicitors declined to send the conveyance to them by special messenger, except at the purchaser's expense. Fry, L. J., considered that this was also a wilful default on the vendor's part. But the Court, including Fry, L. J., held that the purchaser was only entitled to be absolved from paying interest during the delay occasioned by the vendor himself being away from England, and that a reasonable time (a fortnight) must be allowed for the mortgagees' execution, during which time the purchaser must pay interest: *Ibid.*

(d) Cause of delay not specified.

(d) *No mention of cause of delay.*

A condition, "if the conveyance be not executed by the necessary parties, and the purchase-money paid on or before (a given day), the purchaser shall pay interest at 5l. per cent." *simpliciter*, and omitting the words "from any cause whatever," has the same effect as condition (b), and will bind the purchaser to pay interest, even if the vendor has, by the state of his title, caused (but not wilfully caused) the delay: per Leach, V.-C., in *Esdaile v. Stephenson*, 1 S. & St. 122.

(e) Other forms.

(e) *Other forms of the condition.*

"Unavoidable obstacle."

A stipulation that interest at 5l. per cent. shall be paid if the delay arises "by reason of any unforeseen or unavoidable obstacle," does not entitle the vendor to interest if the delay is caused by the state of the vendor's title: *Monk v. Huskisson*, 4 Russ. 121, n., where Leach, M. R., thought the only effect of such a condition was to show the rate of interest, not to make interest payable which would not otherwise have been payable.

This case would probably not be followed now, and interest would be given under such a condition, unless it could be shown that the vendor knew of the defect in his title, so that it was not an "unforeseen" obstacle.

A stipulation that interest should be paid in case of delay caused "by any unavoidable obstacle," was also held not to

entitle the vendor to interest where the delay is caused by the state of his title: *Birch v. Podmore*, Sug. 635 (but *qu. ?*).

(iv.) *Time from which Interest is Payable.*

Time from which interest payable.

Time fixed for completion.

Interest is payable from the time fixed by the conditions for completion, *i.e.*, as against the purchaser, the time fixed for payment of the purchase-money: *Acland v. Gaisford*, 2 Madd. 28. If a time is fixed for completion, and a time is also fixed for the delivery of the abstract, then, if the vendor is in default in delivering his abstract, interest does not begin to run until a period has elapsed from the delivering of the perfect abstract corresponding to the period between the two dates mentioned in the contract: *Sherwin v. Shakspear*, 5 D. M. & G. 517. Even if it is only a small part for which a perfect abstract is not sent, time runs, as to the whole property, from the delivery of the perfect abstract to that part: *Ibid.*, at p. 530. As to the meaning of "perfect abstract," see above, p. 249.

If a perfect abstract is delivered, interest is payable from the time fixed for payment of interest, notwithstanding that the vendor, in answer to requisitions, furnishes a further unnecessary title: *Litchfield v. Brown*, 23 L. J. Ch. 176.

If no time is fixed for completion, or if the payment of the purchase-money is, by the conditions, made dependent on the execution by the vendor of the conveyance and the giving of possession with a good title, interest will be payable from the time when the vendor showed a good title, and was ready and willing to give possession and execute a conveyance, or (to use Lord Romilly's phrase in *Carrodus v. Sharp*, 20 Beav. 56) the time when the purchaser could "prudently take possession." See *Jones v. Mudd*, 4 Russ. 118, where the agreement was that the vendor would "effectually convey," and the purchaser pay the purchase-money on a specified day, "upon such conveyance and assurance being executed and perfected."

The same rule applies in the case of a purchase by a railway company: *Re Pigott and The G. W. R.*, 18 Ch. D. 146.

The rule as above stated does not distinguish between "showing" a good title, and "making" a good title. A good title is "shown" when all the documents and facts essential to the title

"Showing" a good title.

are stated in the abstract. A good title is not made until the abstract is verified: *Parr v. Lovegrove*, 4 Drew. 170, at p. 181. The cases do not draw this distinction, but say simply interest was payable from the time a good title was "shown." See *Re Pigott and The G. W. R.*, 18 Ch. D. at p. 150, and *Monk v. Huskisson*, cited in *Jones v. Mudd*, 4 Russ. 121, see p. 123. In *Jones v. Mudd*, the Master certified that a good title could be "made" to the estate, and was first "shown" on the 15th of January, 1827, and the Vice-Chancellor, the appeal from whom was dismissed, directed interest to be paid from the 15th of January, 1827. Probably, however, if, soon after receiving the abstract, the purchaser asked for evidence of a certain fact essential to the title, and stated on the abstract, and the delay of the vendor in producing this evidence caused the purchaser to abstain from taking possession, the time at which interest would begin to run would be held to be the time when the vendor produced the evidence, *i. e.*, "made" a good title, and not the time when he delivered the abstract, *i. e.*, "showed" a good title. It is to be observed that if the delay of the vendor to verify any part of his title is caused by the purchaser refusing to complete on another ground, which is afterwards held to be untenable, interest is payable by the purchaser from the time fixed for completion, and not from the time when the vendor verified his title, since such verification in respect of a matter not in dispute was unnecessary until the matters in dispute were settled: *Monro v. Taylor*, 3 Mac. & G. 713, at pp. 724, 725.

• Purchaser in possession.

If the purchaser is in possession at the date of the contract, or takes possession before the vendor has shown a good title or executed the conveyance, interest will be payable from the time fixed for payment of the purchase-money, notwithstanding that the payment of the purchase-money was made dependent on the performance by the vendor of those acts: *Att.-Gen. v. Christ Church*, 13 Sim. 214. And if no time is fixed for the payment of the purchase-money, interest will be payable from the time at which the purchaser took possession (Dart, 711, n. (p)); or, if the purchaser was already in possession at the date of the contract, from the date of the contract: Dart, 711, n. (o). The cases cited by Dart are not conclusive, as in both

of those cited in note (p) a time was fixed for completion, and interest was held to be payable from the time so fixed; and *Ex parte Manning*, 2 P. Wms. 410, the authority cited in note (o), was the sale of a reversion (see below).

The fact that the purchaser, who takes possession, receives no rent and makes no profits, does not affect his liability to pay interest: *Ballard v. Shutt*, 15 Ch. D. 122. There waste land was sold, and the purchaser put up a notice-board on the land, announcing it to be let or sold for building purposes, but he received no rent or profit from the land. Receiving no rent.

Subsequent abandonment of possession by a purchaser who has once taken possession is unavailing; his liability to pay interest continues: *Binks v. Lord Rokeby*, 2 Swanst. 222, at p. 226. Abandoning possession.

On the sale of a reversion, interest is payable from the day fixed for completion, whether the vendor has shown a good title or not. "Upon the sale of a reversion, the time at which the purchaser takes possession has nothing to do with the question of interest on the purchase-money. The advantage obtained by the delay and wearing out of the prior life interest is equivalent to the receipt of the rents of a property in possession": *Bailey v. Collett*, 18 Beav. 179, 182. Reversion.

If no time is fixed for completion, the purchaser of a reversion has (like the purchaser of property in possession, see p. 285) to pay interest from the time when the vendor shows a good title: *Enraght v. Fitzgerald*, 2 Dr. & War. 43.

Even in the case of a reversion, if the conditions show that the purchaser is not to receive the rents until the actual completion of the sale, no interest is payable to the vendor: *Brooke v. Champenowne*, 4 Cl. & F. 589.

An express agreement that "the interest of the remainder of the purchase-money shall not commence till Lady Day next, in case the title shall be perfected, and the conveyances and other assurances of the different estates are executed by that time, and if not, then the interest to commence upon the execution of such assurances," will not entitle the purchaser to refuse to pay interest if he has had possession for many years: *Birch v. Joy*, 3 H. L. C. 565. Such an agreement is not meant to continue Interest from execution of conveyance.

in operation for a long period after the day fixed therein :
Birch v. Joy, 3 H. L. C. 597.

Interest on
timber.

Interest on the sum to be paid for the timber does not begin to run until the sum is ascertained, since the increase in value of the timber between the date of the contract and that of the valuation is regarded as equivalent to interest on the purchase-money : Sug. 631.

On what
interest is
payable.
Deposit.

(v.) *On what Interest is payable.*

In the absence of stipulation, interest is not payable by the purchaser on the amount of the deposit, although, owing to the purchaser's default, the deposit has been retained by the auctioneer : *Bridges v. Robinson*, 3 Mer. 694.

But where the purchaser was to pay into the hands of the auctioneer a deposit of 20*l.* per cent. in part of the purchase-money, and in case of delay the vendor was to have interest at 5*l.* per cent. on the purchase-money, and the auction duty was to be borne equally by the purchaser and the vendor, the purchaser, who had paid the deposit, but not his moiety of the auction duty, was held bound to pay interest on so much of the deposit as had been applied by the auctioneer in payment of the purchaser's moiety of the auction duty : *Townshend v. Townshend*, 2 Russ. 303.

Money re-
tained for
incumbrances.

Interest is payable on part of the purchase-money remaining in the hands of the purchaser for the purpose of paying off incumbrances : *Hughes v. Kearney*, 1 Sch. & Lef. 132, at p. 134.

Rate of
interest.

(vi.) *The Rate of Interest.*

In the absence of stipulation, the rate of interest is 4*l.* per cent. per annum : *Acland v. Gaisford*, 2 Madd. 28. But in *Burnell v. Brown*, 1 Jac. & W. 168, interest was allowed at the rate of 5*l.* per cent., on the ground that the vendor might have made as much as 5*l.* per cent. if the purchaser had paid the purchase-money.

Increasing
rate.

The conditions may reserve interest on an ascending scale : *Herbert v. Salisbury and Yeovil, &c.*, 2 Eq. 221, where Lord Romilly, M. R., refused to treat the increase of interest as a penalty. In mortgages, a covenant to pay increased interest if

the mortgagor is in default is treated as a penalty and relieved against.

In the absence of stipulation, if a mortgagee purchases the equity of redemption and takes possession before completion, the Court will set off the interest payable to him on the mortgage against the interest payable by him on a corresponding portion of the purchase-money, even though interest is payable on the mortgage at a higher rate: *Wallis v. Bastard*, D. M. & G. 251. Interest on mortgage.

In one case, the conditions of sale provided that the purchaser should pay interest on the remainder of his purchase-money at 5l. per cent. By a subsequent agreement, further time was given to the vendor to complete, and it was arranged that the remainder of the purchase-money should be paid at such further time and without interest, and that if the vendor failed to make a good title he should return the deposit, with interest at 4l. per cent. The purchaser afterwards failed to complete, and was held liable to pay interest on the remainder of the purchase-money at 4l. per cent.: *Minchin v. Nance*, 4 Beav. 332. Subsequent agreement.

If the vendor refuses to give possession and allows the property to deteriorate, the purchaser will be entitled to set off the amount of the deterioration, as well as the rents received, or which might have been received, against the interest which he has to pay: *Phillips v. Silvester*, 8 Ch. 173. (With respect to the amount of rents, see below, p. 298.) Deteriorations.

(vii.) *Procedure.*

The Court has jurisdiction, upon a summons under the Vendor and Purchaser Act, 1874, to make a declaration that interest is payable, and as to the rate of interest payable, by the purchaser on the balance of the purchase-money: *Re Monckton and Gilzean*, 27 Ch. D. 564; *Riley to Streatfield*, 34 Ch. D. 386. Procedure.

But interest erroneously paid by the purchaser cannot be recovered by summons under the Vendor and Purchaser Act; an action should be brought to recover it: *Re Young and Harston*, 29 Ch. D. 691. On appeal, the vendor waived the objection as to jurisdiction: 31 Ch. Div. 168.

(viii.) *Appropriation.*

Appropriation.

In the absence of a stipulation that the purchaser shall pay interest if completion is delayed "from any cause whatever," or "from any cause other than the vendor's wilful default," the purchaser may, if completion is delayed on the vendor's part, escape his liability to pay the full amount of interest by appropriating a sum of money for the payment of the purchase-money, and giving the vendor notice of such appropriation. The vendor will, in that case, be entitled only to the interest actually made, and the purchaser will be entitled to the rents and profits. As to vendor's wilful default, see below, p. 291.

It is not well settled what acts amount to appropriation.

Notice.

Merely giving notice that the purchaser will not pay interest is not enough: *Williams v. Glenton*, 1 Ch. 200, where the purchaser actually employed the purchase-money in his trade.

Keeping the money lying idle, and giving the vendor notice, was considered enough in *Dyson v. Hornby*, 4 De G. & Sm. 481, and in *Regent's Canal Co. v. Ware*, 33 Beav. 575 (but this was a compulsory purchase). There is a dictum of Lord Cottenham to the same effect in *De Visme v. De Visme*, 1 Mac. & G. at p. 352. See, however, *Acland v. Gaisford*, 2 Madd. 28, for a contrary view. In *Winter v. Blades*, 2 S. & St. 393, payment into the purchaser's general account at his bankers, and giving the vendor notice that the purchaser was ready to invest the purchase-money as he should direct, was held to be an insufficient appropriation, as the purchaser allowed this money to take the place of the balance which he would otherwise have maintained at his bankers. However, the purchaser was excused from paying interest on the amount of the purchase-money from which he was supposed to have gained no advantage. To ascertain this amount, the purchaser's average balance for three years prior to the purchase was deducted from his average balance during the period of appropriation, and to the amount of that difference the purchaser was not chargeable with interest.

Investing or depositing.

But now, probably, it would be held that the purchaser must either invest the purchase-money, or place it on deposit at a bank to a separate account. See *Williams v. Glenton*, 1 Ch. 200,

at p. 206. The fact that the bank does not allow interest will not vitiate the appropriation. See *Re Golds and Norton*, 33 W. R. 333.

In *Kershaw v. Kershaw*, 9 Eq. 56, the contract was "the amount of purchase-money, 38,500*l.*; purchase to take effect from 30th June, and interest at 5*l.* per cent. to time of payment, and timely notice to be given as to requirement of purchase-money." The purchaser paid 38,000*l.* to a separate account at a bank, and gave notice to the vendor. The vendor replied disputing the sufficiency of the notice, but not pointing out that the sum was 500*l.* too little. The purchaser afterwards discovered the deficiency, and thereupon paid in 500*l.*, with interest. It was held that the purchaser was not liable to pay interest subsequently to the time when he paid in the 38,000*l.*, other than the interest allowed by the bank.

Insufficient amount deposited.

Appropriating the money without giving notice to the vendor that the money is lying idle does not free the purchaser from his liability to pay interest: *Powell v. Martyr*, 8 Ves. 146.

Depositing without giving notice.

If there is an express stipulation that interest is to be paid in case of delay "from any cause whatever," or "from any cause other than the vendor's wilful default," then it would seem (but the authorities are conflicting) that no appropriation will enable the purchaser to escape his liability, unless the delay is caused by the vendor's wilful default.

Effect of condition "any cause, &c." on purchaser's appropriation.

This was laid down in *Riley to Streatfield*, 24 Ch. D. 386 (North, J.), following *Vickers v. Hand*, 26 Beav. 630. The contrary view is supported by *Re Golds and Norton*, 33 W. R. 333 (Kay, J.), and by a dictum of Lord Cottenham's in *De Visme v. De Visme*, 1 Mac. & G. 336, at p. 352, and by some remarks of Knight-Bruce, L. J., in *Williams v. Glenton*, 1 Ch. 200, at p. 206. The discrepancy is probably due to the fact that the distinction between the cases in which there was the stipulation above mentioned, and those in which there was no express stipulation about interest, or interest was only payable in case of the purchaser's default, was not adverted to before the decision of North, J., in *Riley to Streatfield*.

If the delay is due to the vendor's wilful default, as where the vendor repudiates the contract, the purchaser may appro-

Vendor's wilful default.

priate the purchase-money, so as to escape liability to pay interest: *Kershaw v. Kershaw*, 9 Eq. 56. And that, too, notwithstanding that, by the conditions, interest is payable if "from any cause whatever" the purchase is not completed on the day fixed: *Re Monckton and Gilzean*, 27 Ch. D. 555, 564.

Unnecessary
appropriation.

If the purchaser has unnecessarily appropriated the purchase-money in order to escape the payment of interest, which was not really payable, the Court will not make the vendor pay him compensation for the loss of interest owing to such appropriation: *De Visme v. De Visme*, 1 Mac. & G. 336. In that case, the state of the vendor's title delayed the completion beyond the fixed day. The purchaser placed the purchase-money to a separate account on deposit at 2½ per cent., and gave notice to the vendor. The Court held (see above, p. 282, as to the correctness of this decision) that the time when the vendor could show a good title was the time for completion, and that, till then, the vendor was entitled to the rents, and the purchaser did not become liable for interest till after that time. The purchaser claimed compensation for the loss of interest occasioned by the appropriation of the purchase-money. The claim was disallowed, on the ground that the appropriation was unnecessary, and that the loss thereby occasioned was not one arising from the contract.

Purchaser in
default.

It is only in the case of the vendor's default that the purchaser can escape the liability to pay interest by appropriating the purchase-money; if the vendor has made out a good title, and is ready and willing to complete, or if the purchaser takes and insists on an objection which is untenable, the purchaser will have to pay interest, even if he have deposited the purchase-money at a bank. See Dart, 708.

The case of *Calcraft v. Roebuck*, 1 Ves. jun. 221, is not a sufficient authority for this proposition, because the appropriation there was insufficient, inasmuch as the purchaser gave no notice to the vendor: *Ibid.*, p. 225 (and see above, p. 291). In *Humphries v. Horne*, 3 Ha. 276, where the purchaser paid part of the purchase-money, and obtained an injunction to restrain the vendor from suing him for the balance, on the terms of the purchaser paying such balance into Court, the purchaser, who

was afterwards held to have been in the wrong, was ordered to pay interest on such balance, although no interest had accrued on the money in Court.

If the vendor does not assent to the appropriation, and the appropriated and invested purchase-money makes more than the interest payable by the purchaser, the purchaser is not bound to pay the whole of the interest, but only to pay interest at the rate which he would have had to pay if he had not invested the purchase-money; *i. e.*, in the absence of stipulation, interest at the rate of 4l. per cent.: *Acland v. Gaisford*, 2 Madd. 28. Appropriation making more interest.

If the money is invested with the vendor's consent in the joint names of the vendor and purchaser, the vendor is entitled to any gain, and must bear any loss caused by such investment: *Burroughes v. Broune*, 9 Ha. 609. Joint investment.

The purchaser waives his right to escape the payment of interest by appropriation, if, after becoming aware of the fact that the state of the vendor's title must cause long delay in completion, he takes possession and agrees to pay interest: *Dickinson v. Heron*, Sug. 630, n. But if the delay be much greater than the purchaser could reasonably have apprehended, the waiver would probably not be held to be complete. Waiver of right to appropriate.

(ix.) *Income Tax.*

A purchaser paying interest on the purchase-money is entitled to deduct income tax on such interest: per *Malins, V.-C.*, in *Crane v. Kilpin*, 6 Eq. 334 (the case of an assignment to trustees for creditors of a fund in Court). Income tax.

But on a sale by the Court, the purchaser is not, in the absence of stipulation, allowed to deduct the income tax on paying the purchase-money into Court, but may, on payment out, apply to have the income tax which he has paid repaid to him out of the purchase-money: *Bebb v. Bunny*, 1 K. & J. 216.

(x.) *Possession.*

Although the purchaser is regarded in equity as the owner of the land upon the signing of the contract, he is not, in the absence of stipulation, entitled to possession until he has paid his purchase-money, and if he enters before, he is a trespasser: Possession on payment of purchase-money.

Acland v. Gaisford, 2 Madd. 28, citing *Crockford v. Alexander*, 15 Ves. 138.

Payment into Court.

Payment of the purchase-money into Court is not sufficient to entitle the purchaser to possession: *Bygrave v. Metropolitan Board of Works*, 32 Ch. Div. 147.

Instalments.

Where the purchase-money is payable by instalments, and no date is fixed for possession, the purchaser would seem to be entitled to possession only upon the payment of the last instalment. See *Kenney v. Wexham*, 6 Madd. 355 (a sale of a life annuity).

Vacant possession.

In a condition of sale, "possession" means, primarily, vacant possession. But the particulars or conditions may show that vacant possession is not meant. Thus, where an orchard was sold as "in the occupation of X.," the "possession" promised to the purchaser was held to mean not vacant possession, but possession subject to and with the benefit of X.'s tenancy: *Lake v. Dean*, 28 Beav. 607.

"Rents and profits" when vendor in occupation.

A stipulation that "the purchaser shall be entitled to the possession or the receipt of the rents and profits" from a certain date, means, in the case of land of which the vendor is himself in occupation, vacant possession by the purchaser, the words "rents and profits" being otiose and ineffectual: *Anker v. Franklin*, 43 L. T. N. S. 317. Evidence of a parol agreement that the vendor should pay rent was not admitted for the purpose of proving the meaning of the words "rents and profits": *Ibid.*

"Quarter-day before day of payment."

In a condition binding the purchaser to pay the purchase-money in May, and if completion is delayed to pay interest until completion, the words "and he is to be let into possession from the quarter-day next preceding the day of payment," were construed as giving the purchaser the right to the rents from the quarter-day before the day fixed for payment, *i. e.*, the 25th of March, not the quarter-day next before the day of actual payment, which was in December: *Nicholson v. Nicholson*, 5 L. J. (N. S.) Ch. 51.

Possession with good title.

Where it is agreed simply that "possession" shall be given on a fixed day, this means possession which cannot be disturbed, possession with a complete title previously shown, though not

necessarily with a conveyance to the purchaser previously executed: per Rolt, L. J., in *Tilley v. Thomas*, 3 Ch. 61.

But where one day is fixed for giving "possession," and another subsequent day for "completion," possession there means possession irrespective of title: per Lord Cairns, *ibid.*

Where a contract fixed a day for possession, and no reference was made to completion, except a clause providing for the return of the deposit "in the event of the sale not being completed," the word "completed" was read as referring to the day fixed for possession: *Tilley v. Thomas*, 3 Ch. 61.

But for the case of *Royal Bristol, &c. v. Bomash*, 35 Ch. D. 390, the following rule might be laid down in respect of damages for the loss of possession:—

If the vendor, through the state of his title, is unable to give possession to the purchaser upon the day fixed for giving possession, or, if no day is so fixed, upon the day fixed for completion, the purchaser will be entitled to the rents and profits subsequently received by the vendor, but not to damages. If the vendor wilfully refuses to complete, the purchaser may, in addition to obtaining specific performance of the contract for sale, recover damages for the breach of the vendor's express or implied contract to give possession at a certain date. Such damages will be in the nature of damages for a loss *pro tanto* of the bargain.

Damages for loss of possession.

The above rule seems a necessary deduction from the rule laid down in *Flureau v. Thornhill*, 2 W. Bl. 1078; *Bain v. Fothergill*, L. R. 7 H. L. 158; and *Engell v. Fitch*, L. R. 3 Q. B. 314; 4 Q. B. 659. That rule is briefly this: if the vendor has acted fraudulently, or has wilfully refused to complete, the purchaser may recover damages for the loss of his bargain in addition to the expenses of the sale; but if the contract falls through merely because the vendor cannot show a good title, the purchaser is entitled to no damages beyond the expenses of the sale. See Chapter XVI., p. 122.

Damages for the loss of possession, owing to the vendor's wilful refusal to complete, were given in *Jacques v. Millar*, 6 Ch. D. 153, which was the case of an agreement to grant a lease. In consequence of the lessor's wilful refusal to grant a

Vendor's wilful refusal.

lease, the lessee who, as the lessor knew, intended to commence a trade on the property, was unable for fifteen weeks to commence his trade. The Court granted specific performance of the contract, and 250% damages in respect of the lessee's loss of profits from his trade.

Vendor's refusal not wilful.

A house was sold as "recently in the occupation of F.," the vendor expecting that F. would be willing to quit before the day fixed for completion, but F.'s occupation did not cease at the time fixed by the conditions for completion and giving of possession; the purchaser was held entitled to compensation for the loss of a tenant during the period elapsing from the time fixed for completion: *Royal Bristol, &c. v. Bomash*, 35 Ch. D. 390. As the vendor there refused to give compensation, and brought an action for specific performance, the period was that from the time for completion to the judgment in the action by the vendor for specific performance. The measure of the compensation was the amount of the rent which the purchaser would have received from a tenant, to whom he had agreed to let the house, during that period.

This case seems to be wrong on the principle of *Bain v. Fothergill*, L. R. 7 H. L. 158, and *Engell v. Fitch*, L. R. 4 Q. B. 659, that damages for the loss of bargain are not given in the case of sales of land, unless the vendor is guilty of fraud or wilful default. There was no fraud or wilful default in *Royal Bristol, &c. v. Bomash*; see 35 Ch. D. at p. 396.

Time of essence.

In contracts where time is of the essence (see pp. 271 to 274), a defect in title must be cleared up before the day fixed for possession, unless the contract provides for "possession" and "completion" on different days. If possession with a good title cannot be given on the day fixed, the purchaser may, where time is of the essence, rescind, or, if he elect to complete, he will be entitled to compensation. See *Gedge v. Duke of Montrose*, 26 Beav. 45.

Acts of purchaser taking possession.

In the absence of stipulation, a purchaser taking possession before he has paid the purchase-money is not entitled to do any act which would diminish the vendor's security for the purchase-money.

Timber.

In *Crockford v. Alexander*, 15 Ves. 138, a purchaser was restrained by injunction from felling timber.

A purchaser who alters the property during his possession, will, in case the purchase falls through, be compelled to re-instate the property or give compensation. In *Donovan v. Fricker*, Jac. 165, the purchaser had converted a dwelling-house into a shop, and was compelled to restore the house to its former condition. (The case is not reported as to this point, but the decree is given in the report at pp. 165, 166.) Altering property.

A purchaser who fells ornamental timber, or does any other act for which compensation cannot be assessed, would probably be held to have waived the right to object to the title: Cf. *Magennis v. Fallon*, 2 Moll. 561. Irremediable damage.

In a contract for the sale of a house to the School Board, a clause that the Board should be entitled to possession upon depositing the purchase-money, and should not be considered as accepting the vendor's title, was held to give the Board the right after taking possession to pull down the house, since the vendor knew at the date of the contract that their object in purchasing was to build a school: *Bolton v. London School Board*, 7 Ch. D. 766. Pulling down house.

The purchaser will be allowed compensation for substantial improvements made by him, though the sale is rescinded because of his default or fraud (see *Donovan v. Fricker*, Jac. 165), and will, of course, be allowed compensation for necessary repairs: Sug. 254. Improvements.

• (xi.) *Occupation Rent payable by Purchaser.*

In the absence of any stipulation that the purchaser shall pay an occupation rent in case the purchase goes off, the purchaser who has been allowed to take possession before he has accepted the title or paid the purchase-money, cannot be made to pay an occupation rent, if he rescinds because the vendor has no title, although his occupation has been beneficial: *Winterbottom v. Ingham*, 7 Q. B. 611. See also *Williams v. Shaw*, 3 Russ. 178, n., where the purchaser actually stated in his answer that he was willing to pay a fair rent for his occupation on having his deposit repaid him with interest; but that was a suit by the vendor for specific performance, and the matter turned on the pleadings. Occupation rent.

If the purchaser remains in possession after rescission he

will have to pay rent for his subsequent occupation, as tenant at will: *Howard v. Shaw*, 8 M. & W. 118. The distinction is made on the ground that the purchaser, until the contract goes off, is in under the contract, which shows that he was to occupy rent free, but that after the contract goes off the purchaser cannot claim a right to occupy under it.

(xii.) *Rents and Profits.*

Rents and profits.

In the absence of stipulation, the vendor is entitled to the rents and profits up to the date fixed for completion; the purchaser is entitled to them after that date.

If no date is fixed either for possession or for completion, the purchaser would probably not be entitled to the rents and profits until the date of actual completion.

In *De Visme v. De Visme*, 1 Mac. & G. 336, a condition that "the purchaser should pay the remainder of the purchase-money on 26th December, and that on payment thereof he was to be let into possession, or receipt of the rents and profits, as from the 25th December, and in case of default in the payment of the purchase-money, from whatever cause, should pay interest," was held not to entitle the purchaser to the rents except from the time when the vendor was ready to complete: but this decision is doubtful; see above, p. 282.

Rent actually received.

The vendor must account for any rent which he receives after the date fixed for completion; but, unless there are special circumstances, the rule seems to be that the vendor is not liable for more than the rent which he has actually received. If there is any evidence of neglect or mismanagement, the vendor will be charged on the footing of wilful default, *i. e.*, will have to account for the rents which he has received, or which, but for his wilful neglect or default, he might have received. See *Sherwin v. Shakspear*, 5 D. M. & G. 517, for the general rule.

Vendor is trustee for purchaser.

The vendor is, to a certain extent, a trustee for the purchaser, and it is his duty to let the property if vacant, giving previous notice to the purchaser of his intention: *Earl of Egmont v. Smith*, 6 Ch. D. 469. If the purchaser prefers to have the property unlet, then the liability of the vendor ceases: *Ibid.* p. 476. The purchaser so electing must guarantee the vendor against any loss in case the purchase goes off.

The following illustrations show what are special circumstances sufficient to charge the vendor on the footing of wilful default :—

Vendor when charged with rents not actually received.

Allowing the tenants to run in arrear is sufficient: *Acland v. Gaiford*, 2 Madd. 28; and *Wilson v. Clapham*, 1 Jac. & W. 36.

But a reduction of rents is not in itself *prima facie* evidence of mismanagement, so as to justify an inquiry: *Sherwin v. Shakspear*, 5 D. M. & G. 517, at p. 537.

Neglect to attempt to procure a tenant, or to preserve the property from dilapidation, was held sufficient in *Phillips v. Silvester*, 8 Ch. 173. This case need not be regarded (as Dart, p. 734, regards it) as inconsistent with the general rule laid down in *Sherwin v. Shakspear*, 5 D. M. & G. 517. The vendors were “wantonly negligent” in respect of dilapidations, and this perhaps, in itself, would be *prima facie* evidence of neglect in regard to letting the property.

If the vendor is in personal occupation of the property, he must, if in default, or if his occupation is not necessary for the purpose of preserving the property or preventing a depreciation of the value of the property, pay a rent for the period of his occupation after the date fixed for giving the purchaser possession. This seems to be the rule to be deduced from the cases. In *Dyer v. Hargrave*, 10 Ves. 505, at p. 511; *Sherwin v. Shakspear*, 5 D. M. & G. 517, and *Metropolitan Ry. Co. v. Defries*, 2 Q. B. D. 189, 387, an occupation rent was enforced; and in all these cases the vendor was in default. In *Dakin v. Cope*, 2 Russ. 170, and *Leggott v. Metropolitan Ry. Co.*, 5 Ch. 716, an occupation rent was not enforced, and there the purchaser was in default, and the vendor’s occupation was necessary, the houses being used for the business of a licensed victualler.

Occupation rent by vendor.

The words “rents and profits” in a condition of sale have been taken to imply an occupation rent if the vendor is in occupation: per Field, J., in *Metropolitan Ry. Co. v. Defries*, 2 Q. B. D. 189.

The “profits” to which the vendor is entitled until completion, whether under the general law or by a special condition, include crops cut before the date fixed for completion, and fruit

gathered and plantation thinnings made before that date; also, in the case of a manor, fines and heriots becoming payable before the date fixed for completion.

There is an analogy, though not a perfect one, between the case of a vendor remaining in possession and that of a tenant for life punishable for waste. In both cases "profits" are distinguished from the land or the inheritance, and it may be said roughly that timber and minerals are part of the land, and not "profits," and cannot be cut or gotten by the tenant for life or the vendor for his own benefit. What is called "waste" in the case of a tenant for life is called "deterioration" in the case of a vendor.

Windfalls. Windfalls, *i.e.*, timber blown down after the contract, belong to the purchaser: *Poole v. Shergold*, 2 Bro. C. C. 118. As to timber cut and minerals gotten by the vendor, see below, p. 302.

Fines. On the sale of a manor, the vendor is entitled to receive all fines payable before the date fixed for completion, although not actually paid before that date: *Cuddon v. Tite*, 1 Giff. 395.

A condition that the purchaser shall be entitled from a certain date to "the rents and profits of such parts of the estate as are let," does not give him any right to profits derived otherwise than from letting, *e.g.*, to a manorial fine: *Earl of Hardwicke v. Lord Sandys*, 12 M. & W. 761.

Growing crops. After a sale in May of land, including hay and growing crops, completion being fixed for 24th June, by a subsequent agreement the time for completing was extended to 29th September. The Court held that the purchaser was by the alteration deprived of his right to the hay and growing crops: *Webster v. Donaldson*, 34 Beav. 451.

Covenant to repair. After the sale of a freehold house "with possession on the 25th March," the vendor's lessee, whose lease expired on that day, gave up possession in February without prejudice to his liability to repair under a covenant in the lease. The purchaser claimed to be entitled to the benefit of the covenant to repair, but it was held that he was simply entitled to possession, and that the benefit of the covenant belonged to the vendor, and was not included in the contract of sale: *Re Edie and Brown*, 58 L. T. N. S. 307.

(xiii.) *Deterioration.*

Loss by accidental deterioration must be borne by the purchaser. Thus, if a house is burnt down after the contract the loss falls on the purchaser. The vendor who has insured the house is entitled to receive the full purchase-money, although the house has been burnt and the insurance company has paid him the sum for which the house is insured. The purchaser is not, in the absence of stipulation, entitled to recover that sum from the vendor: *Rayner v. Preston*, 18 Ch. Div. 1. But it would seem that the purchaser is entitled to require the insurance company to expend the insurance money towards re-building the house under 14 Geo. 3, c. 78, s. 83. And the insurance company can claim repayment of the insurance money from the vendor, according to the doctrine of subrogation, if the vendor has been paid in full by the purchaser: *Castellain v. Preston*, 11 Q. B. Div. 380.

The effect of a condition that the purchaser shall have the benefit of the vendor's insurance would seem to be this: The purchaser would be entitled to an abatement of his purchase-money to the extent of the amount received by the vendor from the insurance company, and as between the vendor and the insurance company the doctrine of subrogation would not arise. A contrary opinion is expressed in Dart, p. 197; but it is difficult to see how there can be any subrogation. The vendor, owing to the condition of sale, has not received the full purchase-money; in other words, his loss has not been diminished by any payment from the purchaser, so that there is no advantage or right to an advantage into which the insurance company can claim to be subrogated.

Condition as to insurance.

If the purchaser has no right against the insurance company under 14 Geo. 3, c. 78, s. 83 (and it is to be observed, that that Act only applies to the burning of houses or buildings, and that moneys paid in respect of trade fixtures are not within its application: *Ex parte Gorely*, 4 D. J. & S. 477), it would seem that the purchaser has no remedy in the absence of express stipulation by the vendor.

Deterioration for which the vendor is liable may be either wilful or permissive. Wilful deterioration is deterioration caused

Deterioration by vendor.

by the vendor's acts, *e.g.*, cutting timber, or getting minerals. Permissive deterioration is that caused by the vendor's neglect, *e.g.*, allowing the land to go out of cultivation, or the houses to become dilapidated.

Timber, &c. If the vendor has committed or allowed any deterioration, he is liable to pay the purchaser compensation. The land belongs in equity to the purchaser after the signing of the contract, and any timber felled, or minerals won, by the vendor, belong as part of the land to the purchaser, and not as profits to the vendor. If the vendor cuts any timber, or gets any minerals, he must pay the purchaser compensation for this deterioration in the purchaser's property. See, as to timber, *Magennis v. Fallon*, 2 Moll. 561, at p. 591.

Assessment of damages. The damages or compensation to be given for wilful deterioration, differ from the penal damages awarded against a mere trespasser. In the case of a trespasser working coal in his neighbour's land, the proper estimate of damages is the value of the coal when gotten, without deducting the expense of severing it from the freehold, but allowing the expense of bringing it to the pit's mouth: *Martin v. Porter*, 5 M. & W. 351. In the case of a vendor working a coal mine after the signing of the contract, the proper test of value is the market value of the coal *in situ naturali*, calculating that value upon what the coal would sell for, and deducting therefrom the expense not only of carrying it to market, but of severing it from the freehold: *Brown v. Dibbs*, 37 L. T. N. S. 171.

Unsuitable buildings. Damages will not be given for the demolition by the vendor of buildings which are so unsuited to the property that their demolition does not diminish the selling value of the property: *Krehl v. Park*, 31 L. T. N. S. 325.

Irremediable deterioration. If the deterioration committed or permitted by the vendor makes the property essentially different from what it was when the contract was signed, or from the description given by the vendor, the purchaser will be entitled at his option to rescind, or receive compensation.

Thus, if the vendor cut ornamental timber, this makes the property essentially different, and entitles the purchaser to rescind: *Magennis v. Fallon*, 2 Moll. 561. If the vendor cut

ordinary timber, this is a deterioration which can be compensated for: *Ibid.*

See, further, as to what is an "essential" alteration in the property, Chapter XIV. p. 102.

If, on a sale of a lease containing a covenant to insure with forfeiture in case of non-performance of covenants, the vendor neglects to pay a premium falling due before actual completion, the completion having been delayed by the vendor's default, the purchaser may rescind, because the failure of the vendor to insure has rendered the lease liable to forfeiture, and the title is therefore defective: *Palmer v. Goren*, 4 W. R. 688. If the lessor waived the forfeiture, the sale would probably be enforced.

The vendor may, if the purchaser is alone in default, escape his liability for deterioration by inviting the purchaser to take possession without paying his purchase-money: per Lord Selborne in *Phillips v. Silvester*, 8 Ch. 178. Purchaser when liable for deterioration.

Where both the vendor and the purchaser, owing to a mistake, came to the conclusion that a good title had not been shown to the property, and entered into a new agreement giving the vendor further time for completion, and in consequence of such mistake the purchaser refused to take possession, the Court held that, notwithstanding the mistake, the purchaser must bear the loss arising from the deterioration of the property, since the state of the title was such that he ought to have taken possession: *Minchin v. Nance*, 4 Beav. 332.

(xiv.) *Outgoings.*

In the absence of stipulation, the outgoings must be cleared by the vendor up to the date fixed for completion, and, if completion is delayed owing to the state of the title, up to the date when a good title is shown: *Carrodus v. Sharp*, 20 Beav. 56. Outgoings.

After the date fixed for completion, if the delay is caused by the purchaser, he must bear the outgoings.

If, notwithstanding the vendor's delay, the purchaser takes possession before completion, he must bear the outgoings from the time he takes possession.

Where no day is fixed for completion, the purchaser would probably not become liable for the outgoings until the date of actual completion, unless he took possession before completing.

On a sale of leaseholds, the vendor must pay or allow the purchaser an apportioned part of the current rent from the last quarter-day to the date fixed for completion: *Laves v. Gibson*, 1 Eq. 135.

Paving.

The expenses of paving incurred under a local Act, which compelled payment by the tenant, the work having been done before the vendor bought the property, and payment not having been demanded until after the purchaser had taken a conveyance, were held to be payable as "outgoings" by the purchaser under the condition: *Midgley v. Coppock*, 4 Ex. Div. 309. Neither the vendor nor the purchaser knew of the charge; the provisions of the local Act compelling payment by the tenant, in effect, though indirectly, compelled payment by the successive owners of the property.

In another case, where the work was completed before the sale, and notice of apportionment (but not the final demand for payment) was served before the date fixed for completion, it was held that the expenses of paving must be borne by the vendor: *Re Bettesworth and Richer*, 37 Ch. D. 535.

Vendor
carrying on
business.

A loss incurred by the vendor in carrying on a business is not an outgoing which the purchaser must bear in case he delays completion, even though the carrying on of the business was necessary in order to prevent the depreciation of the property, e.g., in the case of a public-house, where the licence might have been lost: *Dakin v. Cope*, 2 Russ. 170.

CHAPTER XXXI.

CONDITION FOR RESCISSION.

It is usual to insert a condition enabling the vendor to rescind, in case the purchaser shall insist on a requisition which the vendor is unable or unwilling to comply with. Condition for rescission.

(i.) *What Objections are covered by the Conditions.*

The condition is sometimes limited to "objections to title." Form of the condition.
In such case the right to rescind will only arise when the purchaser's objection is an objection to title: *Painter v. Newby*, 11 Ha. 26. As to what objections are considered by the Court as coming within these words, see below pp. 306, 307. If the condition is general in terms, it will be considered applicable to other objections than objections to title: *Heppenstall v. Hose*, 51 L. T. N. S. 589.

A requisition as to a mere matter of conveyance will not be considered as within the condition, unless "requisitions as to conveyance" are expressly mentioned: *Kitchin v. Palmer*, 46 L. J. Ch. 611. Pearson, J., in *Hardman v. Child*, 28 Ch. D. 712, gives it as his opinion, that the inclusion of "requisitions as to conveyance," is improper, except in the case of trustees selling and wishing to preclude the purchaser from requiring the concurrence of the beneficiaries, and even then, he says, the proper condition would be, that the purchaser should be satisfied with a conveyance from the trustees. Davidson, in his *Precedents and Forms*, Vol. I. (ed. 1885) p. 522, omits requisitions as to conveyance. Dart, p. 178, says the condition is usually framed so as to include requisitions as to conveyance. As to what are "requisitions as to conveyance," see below, p. 307.

A condition embracing "objections and requisitions" is not confined in construction to "objections and requisitions arising out of the abstract": *Gray v. Fowler*, L. R. 8 Ex. 249.

A proviso that "in case the vendor cannot deduce a good title, or if the purchaser shall not pay the money at the appointed day, the agreement shall be utterly void," will be construed as giving the purchaser, in the first case, and the vendor, in the second case, the right to rescind the contract, but not *vice versa*: *Roberts v. Wyatt*, 2 Taunt. 268, at p. 277.

Where the stipulation was, "if any dispute shall arise as to the title, the same shall be submitted to some eminent conveyancer, and in case he shall be of opinion that a good title cannot be made out, then power to vendor to rescind," and there was a prior life estate subsisting in the property, of which the vendor was aware at the date of the contract, it was held that the purchaser's requisition as to the life estate was not such a "dispute" as to come within this stipulation, and entitle the vendor to rescind: *Nelthorpe v. Holgate*, 1 Coll. 203.

Objections
to title.

The following cases illustrate what is an "objection to title" within the meaning of such words when used in a condition for rescission.

A demand to have the legal estate got in, is a mere matter of conveyance, and not an "objection or requisition in respect of the title": *Kitchin v. Palmer*, 46 L. J. Ch. 511.

A requisition that certain annuitants shall join in the conveyance, is an "objection to the title": *Page v. Adam*, 4 Beav. 269.

In another case, the title was approved by the purchaser, but the vendor, who was not in possession, but could have obtained possession by bringing an action of ejectment, refused to do so on the ground of expense, although the contract expressly provided that possession would be given. The condition for rescission was held not to apply, as the demand of the purchaser for possession was not an "objection to title": *Engel v. Fitch*, L. R. 4 Q. B. 659.

Again, the vendor described the property in his advertisement of the sale, as comprising a reservoir and water-works yielding a rental of 60% exclusive of the land and buildings. An objection that this rent of 60% was derived from supplying with water certain houses separated from the reservoir by the property of strangers, over which the vendor had no easement, or any right, beyond a licence from year to year by payment of a rent, was

held not to be an "objection to the title": *Price v. Macaulay*, 2 D. M. & G. 339.

The objection that the vendor has not executed repairs in pursuance of a covenant to repair contained in a lease by the vendor of part of the property, is not an objection to title: *Sale v. Lambert*, 43 L. J. Ch. 470 (not reported as to this part of the case, in the Law Reports).

An undisclosed liability, subjecting the owner of a cottage, whenever he rebuilds, to recede about nine inches from his present frontage, is a matter affecting the title to the property, and is covered by a condition entitling the vendor to rescind in case the purchaser makes any objection to the title which the vendor cannot comply with: *Buxton v. Bellin*, 3 Victorian L. R. 243 (Eq.).

In a condition for rescission, the words "requisitions in respect of the conveyance" do not include the objection of a purchaser to an alteration in the draft conveyance, by which the vendor seeks to impose on the purchaser a liability not previously affecting the property and not mentioned in the particulars or conditions; *e. g.*, the obligation to repair a wall: *Hardman v. Child*, 28 Ch. D. 712. The words "objections and requisitions" were held not to apply to the objection of the purchaser to the insertion in the conveyance of words restricting the purchaser's enjoyment of the property, when the proposed restriction was not mentioned in the contract and did not appear in the abstract: *Re Monckton & Gilzean*, 27 Ch. D. 555; see also p. 306, *Page v. Adam*, 4 Beav. 269.

Requisitions
as to convey-
ance.

If the condition does not expressly apply to a claim by the purchaser for compensation under a condition allowing compensation for errors, the purchaser may, in certain cases, enforce his right to compensation even though the vendor would prefer to rescind under the condition for rescission.

Claim for
compensa-
tion.

If the vendor has admitted, or the purchaser can prove clearly, that an error in description has been made, which is covered by the condition for compensation, the vendor will have to give compensation, and will be unable to rescind on the ground of unwillingness to give compensation. But if there is a dispute whether any such error has in fact been made, still more if the purchaser is unable to prove that there has been any misdescrip-

tion, and relies merely on the inability of the vendor to prove that the description is correct, the demand for compensation is an "objection or requisition" within the condition for rescission, and the vendor may rescind.

In *Painter v. Newby*, 11 Ha. 26, the particulars stated that there was a customary right of renewal to the property sold. The vendor had admitted that this was incorrect. It was held that the purchaser was entitled to compensation under the condition for compensation, and that the vendor could not rescind under the condition for rescission, which applied only to "objections to title."

In *Mawson v. Fletcher*, 6 Ch. App. 91, under a condition for rescission "if any objection or requisition is persisted in," the purchaser, who complained that the vendor had described the property as containing limestone, &c., whereas the abstract showed he had no right to the minerals, was held to be precluded from obtaining compensation under the condition for compensation. The ground of the decision in this case, and the distinction between it and *Painter v. Newby* (see above), would seem to be that in the latter case there was no real dispute, but in *Mawson v. Fletcher* the vendor claimed that he could show a title by adverse possession or otherwise, and the objection of the purchaser accordingly amounted to an objection to the title. Mellish, L. J., remarked (p. 93) that if there were a clear case of defect of title to part, the purchaser would be entitled to specific performance with compensation.

There are *dicta* of Lord Romilly in *Hoy v. Smythies*, 22 Beav. 510, which put the purchaser's rights under the condition for compensation higher than is stated above. In that case the condition for rescission (condition No. 8) was of very wide application, embracing objections and requisitions "as to the vendor's title, the abstract of title, evidence of title, conveyance, or otherwise;" and the condition for compensation included the words—"But this condition shall not limit the vendor's right to rescind the contract under the 8th condition." His Lordship thought (p. 520, *ibid.*) that the condition for rescission did not apply to misdescription covered by the condition for compensation. These *dicta*, however, are virtually overruled by the decision in *Mawson v. Fletcher*, 6 Ch. App. 91.

The stipulation "if purchaser's counsel shall be of opinion that a marketable title cannot be made by the day fixed for completion, the agreement shall be void," was construed as overriding the condition for compensation, and as enabling the vendor to rescind upon purchaser's counsel advising that an absolute title could only be made out to two-thirds of the property: *Williams v. Edwards*, 2 Sim. 78.

If there is a condition that no compensation shall be allowed, the ordinary condition for rescission, "in case the purchaser shall insist on any objection or requisition," would probably be held to apply to a demand by the purchaser for compensation. In *Re Terry & White's Contract*, 32 Ch. Div. 14, the condition for rescission was only as to "any objection or requisition," but the preceding condition as to the time for sending in requisitions was worded "objections and requisitions to or in respect of the title, and of all matters appearing upon the abstract or the particulars or conditions of sale"; and it was held that the demand for compensation was a requisition as to "a matter appearing upon the particulars of sale."

The condition for rescission does not entitle the vendor to rescind, if the defect was known to him at the date of the contract, unless the purchaser also knew or had notice of the defect. For instance, where the vendor's mother was, as the vendor knew, life tenant of the property, and had not agreed to concur in the sale, the purchaser was allowed to insist on compensation notwithstanding the condition: *Nelthorpe v. Holgate*, 1 Coll. 203. "If," said Knight Bruce, V.-C., at p. 222, "Mr. Holgate had satisfied the Court that he entered into the contract in ignorance of his mother's life estate, or under a mistaken notion that he was entitled to sell, and could make a title to the fee simple in possession without her concurrence, or in consequence of any promise or representation on her part that she would concur in the sale," or that the purchaser also knew or had notice of the defect, "the case would have been different."

The condition for rescission probably will not enable the vendor to rescind if he has been guilty of intentional misrepresentation (see *Price v. Macaulay*, 2 De G. M. & G. 339, at p. 347); or if, having a perfect title, he has fraudulently delivered

Defects known to the vendor.

Fraud.

an imperfect abstract with the view of inducing the purchaser to deliver and insist on requisitions so as to enable him to rescind under the condition: per Wigram, V.-C., in *Morley v. Cook*, 2 Ha. 106, at p. 114.

Offering an underlease for sale as a "lease" in reliance on the promise of the leasehold reversioner to concur, is not, on the failure of the latter to keep his promise, such a misrepresentation as to disentitle the vendor to rescind under the condition: *Duddell v. Simpson*, 2 Ch. App. 102.

No title.

The condition will not enable the vendor to rescind if he fails to show any title at all. In such a case, the purchaser will be entitled to damages for his expenses in investigating the title, notwithstanding the condition for rescission: *Bowman v. Hyland*, 8 Ch. D. 588. Nor will the condition entitle the vendor to rescind, after making many fruitless attempts to remove the objection made by the purchaser: *McCulloch v. Gregory*, 1 K. & J. 286, at p. 295.

"Unwilling."

The condition is often framed thus:—"Objections, &c., which the vendor shall be unable, or, on the ground of trouble, expense, or any other reasonable ground, unwilling, to remove, &c."

But even in the absence of such qualifying words the effect of the condition for rescission would be the same; the vendor's unwillingness must be a reasonable, not arbitrary, unwillingness. Such a condition is intended "only to meet the case of a purchaser insisting on an objection which the vendor is absolutely unable to remove; or if not absolutely unable, the removal of which would throw upon him such an amount of expense as it would be unjust that he should be compelled to bear": Pearson, J., in *Hardman v. Child*, 28 Ch. D. 712. "The word 'unwilling' in a condition of sale of this description is not to be considered as giving an arbitrary power to the vendor to annul the contract": Turner, L. J., in *Duddell v. Simpson*, 2 Ch. App. 102, at p. 127. So, too, in *Gray v. Fowler*, L. R. 8 Exch. 249, at p. 265, Bramwell, B., says the unwillingness must be reasonable. There are, it is true, *dicta* to the contrary. Thus, in the case last cited, Kelly, C. B., says (p. 273) that it is wholly immaterial what was the cause of the vendor's unwilling-

ness; and in *Dames and Wood*, 27 Ch. D. 172, Bacon, V.-C., says, "Nobody has a right to inquire why he (the vendor) is unwilling." But it seems to be now well established that the unwillingness of the vendor under the condition must be a reasonable unwillingness. See per Cotton, L. J., in *Dames and Wood*, 29 Ch. Div. 626, at p. 630.

The condition for rescission does not, therefore, absolve the vendor from the duty of delivering as perfect an abstract and deducing as good a title (within the limits stipulated for) as he is able to do without incurring unreasonable trouble or expense: *Greaves v. Wilson*, 25 Beav. 290. But if the original abstract, though showing a defective title, is perfect, and the defect in the title is afterwards modified, it has been thought that the vendor is not bound to deliver a supplemental abstract. See *Morley v. Cook*, 2 Ha. 106, at p. 112. This dictum is based on the principle that the delivery of a supplemental abstract would be a waiver by the vendor of his right to rescind (see below, p. 315, and *Tanner v. Smith*, 10 Sim. 410, there cited). On the other hand, it might be argued that, in fairness to the purchaser, the vendor should inform him if the title has been rendered less defective since the delivery of the abstract, in order that the purchaser may withdraw his original requisition.

The vendor may refuse to comply with the requisition on the ground that it involves considerable labour and expense, or that it is frivolous and not taken for the real purpose of clearing the title from substantial objections: *Dames and Wood*, 29 Ch. Div. 626, at p. 630.

The vendor's refusal to procure incumbrancers to join in the conveyance to the purchaser is an unreasonable refusal: *Greaves v. Wilson*, 25 Beav. 290. There the property was sold expressly "free from incumbrances." But even where this is not the case, the general rule is that the purchaser is entitled to have any charges not mentioned in the particulars cleared off out of the purchase-money; and the condition for rescission does not entitle the vendor to rescind simply on the ground of unwillingness to pay off such charges: *Re Jackson and Oakshott*, 14 Ch. D. 851. If the validity of the charges is *bonâ fide* disputed by the vendor, the case would be different; in *Re Jackson and Oakshott* the vendor had, pending the hearing of the summons, paid off

the charge in question. If the incumbrance exceed the purchase-money, the vendor will be entitled to rescind under this condition, even though he sell "free from incumbrances": *Great Northern Railway and Sanderson*, 25 Ch. D. 788.

Time of the
essence.

If time is of the essence, the vendor may rescind under the condition for rescission if the purchaser refuses to complete on the day named on the ground that certain requisitions must first be complied with. In such a case the vendor could not be said to be acting arbitrarily or unreasonably.

Thus, where there was a condition binding the purchaser to send in requisitions, &c., "and if from any cause whatever the purchase be not completed by the time before specified, the vendor is then, or at any time afterwards, to be at liberty to annul the contract, &c.;" and at the time fixed for completion there were two requisitions, one as to registration and another as to stamping a deed, which the vendor had not yet complied with, but which he was willing to undertake in writing to comply with at his own expense, it was held that on the purchaser's refusal to complete, the vendor was entitled to rescind under the condition: *Hudson v. Temple*, 29 Beav. 536.

Expense.

In one case where the condition was worded "unable or unwilling," the vendor refused, on the ground of expense, to comply with a requisition that he should get in an outstanding legal estate, and it was held that he was bound to comply with the requisition: *Kitchen v. Palmer*, 46 L. J. Ch. 611. The real ground for this decision would, however, seem to be that the condition did not apply to anything but "objections to title," and this was held to be a matter of conveyance: see above, p. 306.

(ii.) *Steps to be taken by the Vendor.*

Steps to be
taken by the
vendor.

In order to obtain the benefit of the condition for rescission, the vendor must either inform the purchaser that he is "unable or unwilling" to comply with the requisition, or must take some steps to rescind. Under a sale by the Court with a condition enabling the vendor, "with the leave of the judge, and, notwithstanding any intermediate negotiation, to cancel the contract," the vendor had not made any application to the

judge to have the contract cancelled, or taken any other steps to rescind. The purchaser on taking out a summons was held entitled to be discharged from his purchase, and to have the deposit returned with the dividends accruing from its investment, and also to be paid his costs, charges and expenses: *Powell v. Powell*, 19 Eq. 422.

The condition usually is, "if the purchaser shall *insist* on any objection, &c." A condition worded "if the purchaser shall *take* any objection, &c.," would probably be construed to mean "if the purchaser shall *insist*, &c." See the argument in *Dames and Wood*, 29 Ch. Div. 626, at p. 628.

The vendor is not entitled to rescind under the condition merely because the purchaser has taken an objection: it is necessary for him to show that the purchaser insisted on the objection: *Duddell v. Simpson*, 2 Ch. App. 102. The vendor must answer the objection, even if his answer is a mere refusal to remove the defect objected to, otherwise the purchaser cannot be said to "insist" on the objection: *Greaves v. Wilson*, 25 Beav. 290. See, too, *Turpin v. Chambers*, 29 Beav. 104. The vendor need not, however, give his reasons for rescinding: *Re Glenton to Haden*, 53 L. T. N. S. 434.

A purchaser who repeats the requisition after the vendor has declined to comply with it, "insists" upon the requisition.

If the purchaser has insisted on the objection or requisition, it is not necessary for the vendor, on giving notice of rescission, to allow the purchaser any further time to determine whether he will waive his objection: *Duddell v. Simpson*, 2 Ch. App. 102. To use the expression of Fry, L. J., in *Dames and Wood*, 29 Ch. Div. 626, no *locus pœnitentiæ* need be given to the purchaser who has once insisted.

The principle is very clearly enunciated by Cairns, L. J., in *Duddell v. Simpson*, 2 Ch. App. at p. 109. "There are four matters which must concur before there is a right to give a notice to rescind the contract. First, there must be an objection to the title; secondly, there must be an inability or unwillingness on the part of the vendor, to remove that objection; thirdly, there must be a communication to the purchaser of the existence of this inability or unwillingness; and fourthly, there must be

an insisting by the purchaser on his objection, notwithstanding this communication. . . . Was there a statement of this inability to the purchaser? and was there then an insisting by the purchaser on his objection? If these two matters of fact existed at the time when the notice to rescind the contract was given, that notice had, in my opinion, the effect of rescinding the contract, and nothing that was done afterwards on the part of the purchaser, no waiver subsequently on his part of the objection on which in the first instance he had insisted, would restore the contract."

Purchaser
withdrawing
before
vendor's
notice.

The purchaser, even though he has insisted on his requisition, may withdraw it at any time before the vendor serves him with notice of rescission. In *Duddell v. Simpson*, 2 Ch. App. 102, Cairns, L. J., said (p. 111), that the purchaser's solicitor might have withdrawn his requisition at the moment the notice to rescind was served on him, by saying "My client will waive the objection, and therefore I refuse your tender" of the deposit, "and refuse your notice."

(iii.) *Waiver by the Vendor.*

Waiver
through nego-
tiation or
litigation.

The usual form of the condition now provides that any "intermediate negotiation or pending litigation" shall not deprive the vendor of his right to rescind under the condition. Sometimes the expression is "notwithstanding any attempt to remove or comply with the objections."

(a) *Conditions not referring to intermediate negotiations, &c.*

(a) Condi-
tions not
providing for
"negotiation
or litigation."

It was, in the case of a condition not containing these qualifying words, held that the vendor, by informing the purchaser that he should have no difficulty in answering the objections, lost his right to rescind on the ground of unwillingness: *Tanner v. Smith*, 10 Sim. 410. "If the vendors once elect to answer the objections, they are, for ever thereafter, precluded from exercising the option given to them, by that condition, to rescind the contract": Shadwell, V.-C., *ibid.*

But the judgment of Cairns, L. J., in *Duddell v. Simpson*, 2 Ch. App. 102, quoted above, p. 313, shows that a vendor does not waive his right to rescind through merely answering the requisi-

tions, as it is necessary for the vendor to answer in order to see if the purchaser insists. An answer "without prejudice" would probably not amount to waiver: per Wigram, V.-C., in *Morley v. Cook*, 2 Ha. 106, at p. 115. But after a lengthened correspondence between the parties, the vendor's solicitor, who sends a further abstract "without prejudice," cannot prevent the previous correspondence from amounting to a waiver of the condition: *Cutts v. Thodey*, 13 Sim. 206.

If the condition does not contain the words "notwithstanding any pending litigation," the vendor, by bringing an action for specific performance, loses his right to rescind in respect of requisitions made before the action, but does not thereby lose his right to rescind in respect of other requisitions: *Gray v. Fowler*, L. R. 8 Ex. 249. He cannot, of course, rescind unless he first procures the dismissal of his action: *Warde v. Dixon*, 28 L. J. Ch. 315, see p. 322. In that case, it was thought that the vendor must procure its dismissal with costs; but in *Gray v. Fowler*, the vendor was allowed to rescind, on having his action dismissed without costs, probably because the objection to the title, in respect of which the vendor rescinded, was one raised by the purchaser in his defence to the vendor's action for specific performance.

(b) *Conditions referring to intermediate negotiations, &c.*

A condition in the usual form, containing the words "notwithstanding any negotiation or litigation," does not enable the vendor to rescind and return the deposit without paying the purchaser his expenses and costs, if the vendor's rescission and offer to return the deposit was made after the purchaser had brought an action for the recovery of the deposit, the vendor having resisted a valid objection to his title: *Best v. Hamand*, 12 Ch. D. at p. 6, judgment of Hall, V.-C. The decision was reversed on the ground that the purchaser's objection to the title was precluded by the conditions.

(b) "Intermediate negotiation," &c.

Where the purchaser says the vendor has no power to sell, and the vendor insists that he has, this is a dispute, not a "negotiation or attempt to comply with the requisition," and if the purchaser incurs further expense in consequence of the vendor's

contention, the vendor cannot afterwards turn round and elect to rescind under the condition: *Gardom v. Lee*, 3 H. & C. 651. "If the vendor had proposed that an indemnity should be given, or that some other mode should be adopted for obviating the objection to the title, that might have been a negotiation": *Ibid*.

Express
waiver.

The vendor may lose his right to rescind by confirming the contract, *i.e.*, making a new contract, or by varying the condition for rescission itself by a parol agreement, as in *Dawson v. Yates*, 1 Beav. 301.

Waiver by
delay.

He may waive his right by unreasonable delay, by continuing to treat long after the defect in title is made known to him, and the purchaser has insisted on his requisition: *Bowman v. Hyland*, 8 Ch. D. 588. The test of unreasonableness is, "Was the delay so great as to lead the Court to the conclusion that the vendor had determined his option to rescind by resolving to go on with the contract?" : *Gray v. Fowler*, L. R. 8 Ex. 249, at p. 281. In that case a delay of nearly five months was, under the special circumstances, held not unreasonable. Where time is not of the essence, the vendor need not give notice of rescission before the time fixed for completion: *Vestry of St. Leonard's, Shoreditch v. Hughes*, 17 C. B. N. S. 137. Where the contract was entered into on the 19th of August, and was to be completed on the 29th of October, and the abstract was delivered on the 6th of September, the requisitions on the 22nd of September, the replies thereto on the 4th of November, and the purchaser issued a writ for the deposit on the 29th of November, and the vendor, after the return of the deposit, gave notice to rescind on the 11th of November, this was held to be reasonable notice: *Ibid*.

(iv.) *Litigation by the Purchaser.*

The condition allowing the vendor, in case of objection, &c., to "rescind and return the purchaser's deposit without interest," does not entitle the vendor to retain the deposit as long as he pleases, making fruitless efforts to remove an objection made by the purchaser: *M'Culloch v. Gregory*, 1 K. & J. 286.

The vendor is entitled to rescind under the condition, even after the purchaser has brought an action for specific performance: *Hoy v. Smythies*, 22 Beav. 510. If the purchaser goes on

with his action after the vendor has given notice of rescission, the action will be dismissed, notwithstanding that the purchaser may, in the pleadings, have waived his right to insist on the requisition, and the action will be dismissed with costs from the time when the notice to rescind was received by the purchaser: *Duddell v. Simpson*, 2 Ch. App. 102.

(v.) *Procedure.*

The question whether the vendor has validly exercised the power of rescission given him by the conditions of sale, may be tried on a summons under the Vendor and Purchaser Act, 1874. It is not "a question affecting the existence or validity of the contract" within the meaning of sect. 9 of the Act, those words referring only to the inception of the contract: *Re Jackson and Woodburn's Contract*, 37 Ch. D. 44.

CHAPTER XXXII.

THE CONVEYANCE.

(i.) *Preparation and Expense of Conveyance.*

Preparation
of convey-
ance.

Expense.

EVEN apart from stipulation, the purchaser is bound to prepare the conveyance at his own expense, and tender it to the vendor for execution: *Poole v. Hill*, 6 M. & W. 835. The costs of perusal and of execution by all necessary conveying parties, must be borne by the vendor: Sug. 561. See further as to expense, pp. 338 to 341.

(ii.) *Form of Conveyance.*

Form of
conveyance.

The vendor is not entitled to raise objections to the form of the conveyance, unless it involves a matter of substance affecting the vendor, or entails extra expense upon him: per Page Wood, V.-C., in *Cooper v. Cartwright*, John. 685.

Keeping
mortgage on
foot.

Thus, where the vendor is a mortgagor, and contracts to sell the fee simple "free from incumbrances," and the purchaser afterwards agrees with the mortgagee to keep the mortgage on foot, the purchaser may insist on having a conveyance of the equity of redemption, instead of a conveyance of the fee free from the mortgage, provided the vendor is discharged from all liability under the mortgage, and is not put to any extra expense: *Ibid.*

Mortgagee
who has fore-
closed.

A mortgagee, who had foreclosed, contracted to sell, and by mistake inserted in the contract a condition that "as the vendor was a mortgagee with power of sale, she would only enter into the usual covenant that she had not incumbered." The purchaser objected to the validity of the foreclosure decree, and insisted on having a conveyance under the power of sale. The Court refused to compel the vendor to sell under the power of sale: *Watson v. Marston*, 4 D. M. & G. 230.

Separate con-
veyances.

If a purchaser desires to have the property conveyed to him in parcels, by separate conveyances, the vendor cannot object to

execute the separate conveyances, provided the whole purchase-money is paid at once, and the conveyances are all tendered for execution at the same time, and the purchaser bears the additional expense: per Jessel, M. R., in *Earl of Egmont v. Smith*, 6 Ch. D. 469, at p. 474.

On the sale of a freehold property, and a judgment recovered against former purchasers who had abandoned their contract, the purchaser was held to be entitled to insist on separate conveyances of the freehold and the judgment, although the Court could see no reason for the conveyances being separate, as it would be impossible to keep the names of the abandoning purchasers off the title: *Clark v. May*, 16 Beav. 273.

The analogy of the foregoing cases suggests the rule that the purchaser, if he bears the additional expense, may require the vendor to get in outstanding estates and incumbrances by separate deeds.

But an intending lessee was not allowed to insist on the lessor obtaining a release by a separate deed of an equitable interest vested in a third person whom the vendor proposed to make a party to the lease, as his concurrence in the lease was sufficient: *Reeves v. Gill*, 1 Beav. 375.

The purchaser is not entitled himself to prepare the deeds getting in incumbrances which are to be paid off out of the purchase-money. He should require the vendor to prepare the deeds, and to submit the engrossment to the purchaser for approval: *Jones v. Lewis*, 1 De G. & Sm. 245.

Preparation
of deeds
getting in in-
cumbrances.

Questions analogous to questions of "doubtful title," may arise with respect to the conveyance, and not to the title strictly so called. See *Freer v. Hesse*, 4 D. M. & G. 495. The question of doubtful title is discussed above, pp. 191 to 207.

"Doubtful
title."

(iii.) Parties.

The vendor cannot be compelled to procure the concurrence of unnecessary parties.

For instance, a mortgagee selling under a power of sale validly exercised, cannot be required to obtain the concurrence of the mortgagor, even though the mortgagor covenanted in the mortgage deed to join in any sale by the mortgagee: *Corder v.*

Concurrence
of mortgagor.

Morgan, 18 Ves. 344. Such a covenant is a mere contract between the mortgagor and the mortgagee, to the benefit of which the purchaser is not entitled.

Persons
having a right
to become
bare trustees.

A vendor of copyholds who had both the legal estate and the beneficial interest, was held bound to procure a release from persons who, under the voluntary settlement of a predecessor in title of the vendor, had the right to be admitted, and on admission would be trustees for the vendor: *Steele v. Waller*, 28 Beav. 466.

*Cestuis que
trust.*

Cestuis que trust need not be made parties if the trustees can give a good discharge for the purchase-money (*Binks v. Lord Rokeby*, 2 Sw. 222; see also Lewin on Trusts, ed. 8, p. 451), except for the purpose of covenanting for title, where the contract does not restrict the purchaser's right to have the ordinary covenants, or of covenanting to produce title deeds, where the contract is that they shall so covenant. See *Re London Bridge Acts*, 13 Sim. 176.

Bankrupt.

On the sale of a bankrupt's estate, the bankrupt cannot be compelled to execute the conveyance: see Dart, p. 583. According to Sug. 575, and 2 Dav. pt. 1, p. 619, the bankrupt is usually made a party and covenants for title.

Conditions.

The condition "the vendor is a trustee for sale, and his receipt shall be deemed an effectual and conclusive discharge for the purchase-money, and the purchaser shall not be entitled to require the concurrence of the *cestuis que trust*," is sufficient to inform the purchaser that the vendor had not the usual power to give receipts, and will preclude the purchaser from requiring the receipt of the *cestuis que trust*: *Wilkinson v. Hartley*, 15 Beav. 183.

If the vendor contracts to procure the concurrence of third persons in the conveyance, he will not be allowed afterwards to refuse to procure their concurrence on the ground that they are not necessary parties: *Benson v. Lamb*, 9 Beav. 502.

If the purchaser insists on the concurrence of persons who are abroad, or cannot be found, and whose concurrence, though necessary technically to complete the title, is not practically necessary, the Court may, in a decree for specific performance in an action brought by the vendor, make an order vesting the

estate of such persons in the purchaser, and will probably leave the purchaser to pay his own costs, on the ground of the objection being frivolous. This course was pursued in *Collard v. Roe*, 4 De G. & J. 525, where the purchaser required the concurrence of a dower trustee, who was in Australia.

On a sale by trustees during the life of A., until whose death they had no power of sale, the condition: "The children of A., or the assigns and trustees of such of them as have aliened or settled their estates and interests, shall, if required, join in the conveyance to the purchaser, and the purchaser shall not object to the vendor's title on the ground that the sale is taking place in the lifetime of A.," will not preclude the purchaser from objecting to the title if any of the trustees of A.'s children are incompetent to concur, not having any power of sale. The condition implies that it would be of some use to have the concurrence of these parties, which is not true: *Mosley v. Hide*, 17 Q. B. 91.

The condition, "The purchaser shall not require the execution of the assignment by any other party than the vendors, who are executors," does not preclude the purchaser from objecting that the vendors have no title, and cannot sell: *Re Molyneux*, 13 L. R. Ir. 382; 15 *ib.* 383.

But the condition (on a sale of leaseholds) "The purchaser shall not require that any of the legatees named in the will of R., deceased (other than the vendor M. R., executrix of said will), shall be parties to, or execute the conveyance to the purchaser," is sufficient to preclude the purchaser from requiring proof that the executrix has not assented to the bequest of the leaseholds to the legatees: *Re Ryan & Cavanagh*, 17 L. R. Ir. 42.

(iv.) *Habendum.*

The vendor is not entitled to insert in the conveyance the *Habendum* words, "subject to the several covenants and conditions, restrictions and agreements contained in an indenture dated, &c.," even though the land is subject to such covenants, unless he informs the purchaser what the covenants are: *Re Monckton & Gilzean*, 27 Ch. D. 555. The objection of the purchaser to the insertion of such words, if the vendor has not told him what the covenants

are, is not an "objection or requisition" within the meaning of the condition allowing the vendor to rescind: *Ibid*.

Easements.

A condition that, "the property is sold, and will be conveyed subject to all quit rents, &c., and easements, if any, without any obligation on the vendors to define any such rights or claims," is sufficient to enable the vendor to insist on the insertion of a saving in general terms in the *habendum* of the conveyance, although he does not allege that there are any quit rents or easements: *Gale v. Squier*, 4 Ch. D. 226; 5 *ib.* 625 (a sale by trustees).

Covenants on sale in lots.

On a sale in lots, conditions 9 and 10 provided that the purchasers should repair the roads, and should not erect buildings of less than a specified value, and should use them only as private residences. Condition 11 was as follows, "Statements to the effect of the two last preceding conditions, shall be inserted in the conveyances to the purchasers whom they may respectively affect, and such statements shall have the force and effect of contracts binding in equity." It was held that the proper way to carry out these conditions, was to execute deeds of covenant separate from the conveyances, to hand these deeds of covenant to the vendor, and to endorse notices thereof on the conveyances: *Sidney v. Clarkson*, 35 Beav. 118.

Indemnity.

On the sale of a leasehold property in lots, with a condition providing that each lot should be sold subject to the entire rent, "but with right of indemnity against the other lots, save as to 2l. 10s." (the apportioned rent of each lot), the purchaser of each lot is entitled to an indemnity by way of charge, with powers of distress and entry on the remaining lots, of a proportionate part of the yearly head-rent in exoneration of his lot. The vendor cannot insist on giving only an indemnity in the precise words of the condition of sale: *Re Doherty*, 15 L. R. Ir. 247.

(v.) *Covenants for Title.*

Covenants for title.

- (a) *Who must covenant*; (b) *What covenants may be required*;
(c) *The extent of the covenants.*

(a) *Who must covenant.*

(a) Who must covenant.

Except upon a sale by the Crown, in which case no covenants

for title can be required (Sug. 575), every vendor must, in the absence of stipulation, covenant for title.

On a sale by trustees, in the absence of stipulation, the purchaser is entitled to covenants for title from beneficiaries who take a substantial interest: *Re London Bridge Acts*, 13 Sim. 176, 179. As to the extent of such covenants, see below, p. 326. On a sale by the Court, the beneficiaries do not covenant: *Cottrell v. Cottrell*, 2 Eq. 330. *Cestuis que trust.*

Where the Court directed a sale of a term, and the trustees, instead of acting under this order, sold the fee with the permission of the Court under a power of sale in a settlement which empowered them to sell by the direction of the tenant for life, the tenant for life under the settlement had to give covenants for title: *Earl Poulett v. Hood*, 5 Eq. 115.

On a sale by trustees, the trusts being for A. for life with power for the trustees to sell upon A.'s request in writing, the usual condition that "the vendors being trustees shall be required to give only the statutory covenant against incumbrances implied by reason of their being expressed to convey as trustees," does not preclude the purchaser from requiring a covenant for title from A., the beneficial life tenant: *Re Saucyer & Baring's Contract*, 33 W. R. 26. *Life tenant.*

If a trustee, after contracting to grant a lease containing a covenant by him for quiet enjoyment, becomes of unsound mind, the Court may, under the Trustee Act, 1850, vest a legal term in the lessee, but cannot enable any person to covenant on behalf of the lunatic trustee, so as to bind the lunatic trustee's estate, and the lessee cannot be compelled to complete: *Cooper v. Harmer*, W. N. 1887, p. 186. *Trustee afterwards lunatic.*

(b) *What covenants may be required.*

Certain covenants for title are implied by virtue of the Conv. Act, 1881, s. 7, in conveyances in which the vendor conveys and is expressed to convey as "beneficial owner," &c. It is conceived that in the absence of stipulation the purchaser is entitled (but see s. 66) at his option to require the vendor to convey "as beneficial owner," or "as trustee" (or as the case may be), or to have the proper covenants for title set out at length, in the latter case (b) What covenants. Conveyancing Act, 1881, sect. 7.

paying any increased expense caused to the vendor by the additional length of the conveyance. In cases where the purchaser is entitled to have full covenants for title, but the vendor is not beneficial owner, it would seem to be proper to set out the covenants in full and not to make the vendor convey "as beneficial owner": in such cases the purchaser would not (it is conceived) have to bear any expense caused to the vendor by the increased length of the conveyance.

Seisin.

Where the purchaser is entitled to full covenants for title, a covenant that the vendor is seised in fee used to be one of the covenants which the purchaser might require. See note to *Church v. Brown*, 15 Ves. 258, at p. 263. But as this covenant is obviously and necessarily implied in the covenant for right to convey it was usually omitted. See Jarman's Conveyancing (3rd ed. 1844), vol. ix. pp. 75 and 165, and 1 Dav. (4th ed. 1874) p. 203. The Conv. Act, 1881, s. 7 (A), does not include such a covenant in the list of covenants implied when the vendor conveys "as beneficial owner." If the Conv. Act, 1881, s. 7, is, as seems probable, held to be evidence of what are the usual covenants, such a covenant could not now be required.

Full covenants.

In the absence of stipulation the purchaser has a right to expect full covenants for title. If the vendor is the beneficial owner he can be compelled to convey "as beneficial owner," or give full covenants. But if the vendor is a trustee or mortgagee he cannot be compelled to covenant, except against incumbrances by his own acts. See Lewin, p. 441. If the purchaser contracted to buy without knowing that the vendor was a trustee or mortgagee, he will be entitled to refuse to complete unless he gets full covenants for title, though he probably cannot compel the trustee or mortgagee to give full covenants: but see Dart, p. 622, note (m). If a vendor who was beneficial owner dies before completion, his personal representatives or devisees in trust cannot be compelled to give full covenants, and they may enforce the contract even though the purchaser cannot get full covenants. Even if the vendor had expressly agreed to enter into certain covenants for title, his legal personal representatives or devisees in trust cannot be forced to enter into such covenants personally: *Worsley v. Frampton*, 5 Ha. 560. But they pro-

bably could not enforce the contract unless they gave the purchaser the covenants agreed upon. See the distinction drawn in *Worsley v. Frampton*, between the case of a trustee seeking specific performance, and defending an action brought by the purchaser.

(c) *The extent of the covenants.*

Where the vendor conveys "as beneficial owner," the covenants for title implied by the Conveyancing Act, 1881, are, in the case of a vendor who was himself a purchaser for value (in which expression a person deriving title under a marriage settlement is not included), limited to his own acts, deeds, and omissions, and, in the case of a vendor who was not a purchaser for value, to his own acts, deeds, and omissions, and those of any one through whom he derives title: sect. 7 (A) and (B). Where the vendor conveys "as trustee," or "as mortgagee," the implied covenant extends to his own acts only: sect. 7 (F).

(c) *Extent of covenants.*
Conveyancing Act, 1881, sect. 7.

Where the vendor is not a purchaser for value, there is some difficulty in deciding how far his covenants should extend.

Vendor not a purchaser for value.

Before the Conveyancing Act, 1881, the view of conveyancers seems to have been, that the purchaser might require a vendor, who was not a purchaser for value, to covenant against "the acts of all persons interested in the estate, since the last purchase on which the ordinary covenants for title were entered into, it being understood that a purchaser is entitled to a complete chain of covenants for title": Davidson, ed. 1855, vol. I. p. 196. Lord St. Leonards also states that, "the universal and settled practice of conveyancers is to extend covenants for the title to the acts of the last purchaser": Sug. 574. But he refers to reported cases, as showing that a different view was held by the Court of Chancery. In *Loyd v. Griffith*, 3 Atk. 264, it was held that the vendor's covenant should extend only to his immediate ancestor or deviser, on the ground that "it would be unreasonable to extend it to the first purchaser, where a family have been for several generations in possession of the estate, for they may have had the benefit of the Statute of Limitations and other laws in their favour." In *Wakeman v. Duchess of Rutland*, 3 Ves. 233, it was held that the covenant of a vendor who was not a purchaser for value, need extend only to "the acts of his grantor,

ancestor, devisor, or settlor, and those claiming through such grantor, &c.," and it was said (p. 236) that in a sale by the Court, there is never a "covenant warranting the title; the covenants in conveyances under sales by the Court are, as in every other conveyance, only against his own acts and those of the person immediately preceding him." In the note to *Church v. Brown*, 15 Ves. at p. 263, the point is left doubtful. In *Pickett v. Loggon*, 14 Ves. 215, it was said, that the usual course where the vendor has taken by descent, is for him to covenant "against the acts of his ancestor." In 9 Jarm. Conv. (ed. Sweet) p. 375, it is said, that a vendor who takes under a marriage settlement (and therefore is not a purchaser for value, as regard covenants for title, as to which, see also the Conveyancing Act, 1881, sect. 7) usually covenants "against the acts of his settlor."

Effect of Con-
veyancing
Act, 1881,
sect. 7.

The Conveyancing Act, 1881, coupled with the fact that the phrases "as beneficial owner," &c., have been generally adopted by conveyancers, settles this doubt in favour of the view held by Mr. Davidson and Lord St. Leonards; but raises a fresh doubt, viz. whether the covenant implied by statute does not extend beyond the last purchaser for value, so as to embrace every predecessor in title other than a purchaser for value, notwithstanding the fact that the chain of descent and voluntary alienation has been broken by a purchase for value. The doubt would probably be answered in the negative, on the ground that the derivation of title from such earlier predecessors in title, in addition to being by descent, devise, or voluntary alienation, is also by purchase for value, as, but for the subsequent purchase for value, the land would not have become the property of the vendor.

Life tenant.

A tenant for life is not bound to covenant absolutely except to the extent of his life estate; his covenants for title as respects the reversion should be limited to the acts, deeds, and defaults of himself and his heirs and the persons claiming under or in trust for him, them, or any of them: Dart, pp. 619, 620; Davidson, vol. II. part I. p. 261.

Other cove-
nants by
vendor.
Leaseholds
sold in lots.

(vi.) *Other Covenants which the Purchaser may require.*

On a sale of leaseholds in lots by way of underlease, the purchaser of any lot may require the vendor to covenant to pay the

rent reserved by the original lease, and to perform all the covenants therein contained which affect the residue of the property: *Browne v. Paull*, 26 L. T. 232. Executors, in the absence of stipulation, may be compelled to give an indemnity against the purchaser's liability in respect of the whole rent reserved by the original lease, and the breach of any of the covenants in that lease: *West v. Wild*, 3 L. J. Ch. 15. The mere statement that the vendors are executors is not sufficient to absolve them from this duty: *Ibid*.

(vii.) *Covenants, &c. which the Vendor may require from the Purchaser.*

Covenants by purchaser.

On the sale of an equity of redemption the vendor may probably require the purchaser to covenant to pay the mortgage debt and future interest: *Dart*, 629. But even if the purchaser does not enter into such a covenant, the Court would, after completion, compel him to indemnify the vendor against the mortgage: per Lord Eldon in *Waring v. Ward*, 7 Ves. 332, at p. 337.

Sale of equity of redemption.

On the sale of a reversion the purchaser could probably be compelled to covenant to pay the succession duty: *Dart*, 629.

Reversion.

The purchaser may be compelled to covenant to observe any restrictive covenants affecting the land into which the vendor has entered and of which the purchaser has notice: *Moxhay v. Inderwick*, 1 De G. & Sm. 708 (a suit by the purchaser, who therefore adopted the contract).

Restrictive covenants.

If, however, the existence of these restrictive covenants was not made known, or notice thereof was not given to the purchaser before the sale, he may at his option rescind the contract: *Lukey v. Higgs*, 1 Jur. (N. S.) 200 (where the effect of *Moxhay v. Inderwick* is not correctly stated).

A condition that the conveyance shall contain a covenant by the purchaser to observe certain restrictive covenants entitles the vendor to an unqualified covenant by the purchaser, and not merely a covenant binding him only until he assigns: *Pollock v. Rabbits*, 21 Ch. Div. 466.

A contract for sale of land subject to restrictions as to building, the conveyance to contain a covenant on the part of the

purchaser, "and proper provisions for securing the due observance and performance thereof," entitles the vendor to have inserted in the conveyance a power to enter and remove buildings not properly erected, and to retain possession until payment of the consequential expenses: *Ex parte Ralph*, De Gex, 219.

Annuity.

An agreement to sell land in consideration of an annuity for the vendor's life charged on the land, entitles the vendor not only to a charge, but to a personal covenant by the purchaser to pay the annuity: *Bower v. Cooper*, 2 Ha. 408.

Sale of minerals.

A contract for the sale of minerals at a price payable by instalments, the times of payment to be accelerated if more than a certain quantity should be gotten from time to time, entitles the vendor to the insertion of a power of entering for the purpose of ascertaining the quantity of minerals worked: *Blakesley v. Whieldon*, 1 Ha. 176.

Leaseholds.

A lessee (or an assignee of a lease who has covenanted to pay the rent and perform the covenants) is, even in the absence of stipulation, entitled to insert in the conveyance a covenant by the purchaser to indemnify him against the rent and covenants reserved by and contained in the lease: *Staines v. Morris*, 1 Ves. & B. 8. And that, too, though in the case of the sale by the assignee the assignment to him was executed by the lessee only: *Ibid.*

The executors of a lessee (or assignee who has covenanted to pay the rent and perform the covenants) were formerly, like the lessee or assignee himself, entitled to require the purchaser to give a covenant of indemnity, even in the absence of stipulation: *Staines v. Morris*, 1 Ves. & B. 8. And it makes no difference that the executors or trustees only covenant against incumbrances made by themselves, provided the purchaser knows beforehand that this is the only covenant he will get: *Ibid.*

But now that by 22 & 23 Vict. c. 35, s. 27, the personal liability of executors or administrators for breaches of covenant occurring after an assignment by them has been abolished, it is not clear that they can require the purchaser to covenant to indemnify them against the rent and covenants. It is, however, still usual for the purchasers to indemnify executors or administrators selling leaseholds as well as the estate of their testator or intestate. See Dart, p. 631.

Assignees of a bankrupt under the old bankruptcy law (and ^{Trustee in} probably the same rule applies under the present law) could not ^{bankruptcy.} require a covenant of indemnity by the purchaser against a breach of the covenants in the lease, because as far as they are concerned their liability has ceased, and as far as the bankrupt is concerned, he is, in the absence of stipulation, a stranger to the sale: *Wilkins v. Fry*, 1 Mer. 244. Moreover, they could not by conditions of sale set up the bankrupt's benefit to the detriment of the creditors, without committing a breach of trust, because a lease clogged with such covenants would fetch less in the market: *Ibid.*

Trustees who have taken by assignment, would seem to be similarly unable to insist on a covenant of indemnity in the absence of stipulation, or to employ conditions giving them such a right: *Lewin*, 445.

(viii.) *Time for Delivery of Draft.*

Though the condition fixes a time for the delivery of the draft ^{Time.} conveyance, time is not regarded as essential: *Lang v. Gale*, 1 M. & Sel. 111.

CHAPTER XXXIII.

TITLE DEEDS.

Verification
of abstract.
What deeds
must be pro-
duced.

(i.) *Production of Title Deeds for the Verification of the Abstract.*

IN the absence of stipulation, the purchaser can require the vendor to produce in verification of the abstract all the documents forming the title during the period prescribed by law, or stipulated for in the contract (*Berry v. Young*, 2 Esp. 640 n.); perhaps it should be added, provided they are in the vendor's possession, or that he can compel their production. See *Rippinghall v. Lloyd*, 5 B. & Ad. 742. If the vendor cannot, or will not produce them, the purchaser, it seems, can (subject to the rules as to lost deeds, p. 331) rescind. See *Osborne v. Harrey*, 12 L. J. Ch. 66.

Expired
lease.

An expired lease is not a muniment of title (per Martin, B., in *Ehworthy v. Sandford*, 34 L. J. Ex. 42), and therefore, it would seem, need not be produced.

Instruments
upon record.

In the case of proved wills and instruments upon record, the vendor need not produce the originals, but he must produce office copies or examined copies: Sug. 448. But in the case of a grant from the crown, it is sufficient if the vendor inform the purchaser where the grant is to be found: Sug. 431. Instruments upon record include a copy of Court rolls, deeds enrolled under any act making enrolment evidence, and probably also deeds which have been enrolled merely for safe custody: Sug. 448; and compare Burton, para. 473 note. Mr. Dart, p. 354, referring to 1 Jarm. Conv. 170, thinks that where the enrolment is not compulsory the non-production of the original should be accounted for; at p. 159, note (s), he treats the matter as doubtful, referring to 9 Jarm. Conv. 10.

Instruments deposited in the office of Land Revenue Records and Enrolments, need not be produced: certified copies are sufficient evidence: 15 & 16 Vict. 62, s. 8.

The purchaser cannot rescind because documents of title have Lost deeds. been lost or destroyed: *Harvey v. Philips*, 2 Atk. 541. But the vendor must prove that they have been lost or destroyed. Loss is sufficiently proved by proof that every reasonable search has been made: *Hart v. Hart*, 1 Ha. 1. Where the vendor is excused from the production of documents on the ground of their loss or destruction, he must furnish secondary evidence of such documents: *Bryant v. Busk*, 4 Russ. 1. An abstract proved to have been made before the deeds were lost or destroyed, is proof of the contents only, not of the execution, which must, as a rule, be proved by the attesting witnesses: *Bryant v. Busk*, 4 Russ. 1. A memorial registered in the county registry, is secondary evidence of execution as well as contents: *Cathrow v. Eade*, 4 De G. & S. 527. A very old attested copy of a deed lodged in a public office, was held sufficient secondary evidence without proof of execution: *Harvey v. Philips*, 2 Atk. 541, and (per Lord Hardwicke, *ibid.*) even an unattested copy would, under the circumstances, have been sufficient. The vendor need not prove that the instrument lost or destroyed was properly stamped: *Hart v. Hart*, 1 Ha. 1. A recital forty-four years old, of missing deeds, coupled with a solicitor's affidavit setting out extracts from the account books of a deceased solicitor, making charges for preparing the deeds, and for attending the execution of the deeds, was held to be sufficient proof of execution as well as contents: *Moulton v. Edmonds*, 1 L. T. N. S. 391 (the report 1 D. F. & J. 246, only gives the facts relating to the execution in the head note).

Section 3 (6) of the Conveyancing Act, 1881, which throws the expense on the purchaser, does not relieve the vendor of the duty of production. Even a condition that deeds, evidence, &c., shall be "sought for and procured by, and at the sole expense of, the purchaser" merely throws the expense on the purchaser: *Osborne v. Harvey*, 12 L. J. Ch. 66. See below, p. 335. Conditions relieving the vendor.

A condition that "the vendor shall not be bound to produce any "Produce." original deed, or other documents than those in his possession, and set forth in the abstract," does not relieve the vendor from his liability to verify the title shown upon the abstract (or at all events, to do all in his power to verify the title): *Southby v. Hutt*,

2 My. & Cr. 207. The word "produce" in such a condition, means "deliver up on completion," because it is natural for a vendor to limit a purchaser's right to delivery of title deeds to those actually in the vendor's possession; but it would be unnatural to limit the purchaser's right to the verification of the abstract to deeds in the vendor's possession, excluding deeds of which he has the right or means of procuring production, as the vendor must have intended to give the best proof of his title in his power: *Ibid.* pp. 214, 215.

Place of production.

Under a condition that the vendor will produce the title deeds "at Norwich, at Lynn, or in London," the vendor must give the purchaser reasonable notice at which place he intends to produce the deeds: *Rippinghall v. Lloyd*, 2 N. & M. 410.

(ii.) *Production before Completion, otherwise than for Verification of the Abstract.*

Inspection of all deeds.

Apart from his right to have the deeds produced for the verification of the abstract, the purchaser was formerly entitled to inspect all the title deeds in the vendor's possession, even those of an earlier date than that fixed by law or contract for the commencement of the title. See *Parr v. Lovegrove*, 4 Drew. 170. This right, as to the earlier title deeds, has been taken away by the Conveyancing Act, 1881, sect. 3 (3), cited above p. 228.

Purchaser not entitled to abstract.

A condition precluding the purchaser from his right to an abstract, is not necessarily sufficient to preclude him from his right to inspect the title deeds. Thus, the condition that "the title of the vendors being possessory for thirty years past, no earlier title is to be required, and any investigation is to be at the expense of the purchaser, and unless an abstract is called for, and the intention of investigating the title stated, within seven days from the sale, the purchaser shall be deemed to have waived his right," would, it seems, not preclude the purchaser from his right to see the documents of title, for the purpose of investigating the title, even after seven days had elapsed: per Wood, V.-C., in *Turner v. West Bromwich Union*, 9 W. R. 155. See also *Harding v. —*, 4 L. J. Ch. 213.

(iii.) *Delivery of Title Deeds to the Purchaser on Completion.* Delivery.

"Where the vendor retains any part of an estate to which any documents of title relate, he shall be entitled to retain such documents": Vendor and Purchaser Act, 1874, sect. 2 (5). In all other cases, subject, perhaps, to express stipulation, the purchaser is entitled on completion to all the documents of title affecting the property sold, which are in the possession or power of the vendor: *Austin v. Croome*, 1 Car. & M. 653; *Smith v. Chichester*, 2 Dru. & War. 393, at p. 399.

The vendor is not entitled to retain title deeds merely because he has covenanted to produce them to some other person, *e. g.*, to a first purchaser of part of the property: Sug. 435. All he can require in such a case, is that the second purchaser shall covenant or give an acknowledgment for production, see below, p. 336.

As to the delivery of the common title deeds on a sale in lots, see Chap. XXXVI. p. 356. Former covenant by vendor to produce. Sale in lots.

If the title deeds cannot be delivered to the purchaser, or a valid covenant or acknowledgment be given for their production, the purchaser can rescind, unless the delivery of the title deeds is, under the special circumstances of the case, immaterial. See *Offen v. Harman*, 29 L. J. Ch. 307. There the delivery of three deeds was held to be immaterial, because they were collateral only to the title to the property, and the vendor had produced two of them, and given attested copies, and as to the other, the vendor produced the deed at the hearing, and undertook to deliver an attested copy. The deeds were held to be collateral only, because they were merely releases given to former owners of the property in respect of certain charges which they had redeemed. Collateral deeds.

(iv.) *The Purchaser's right to a Covenant for Production or Acknowledgment and Undertaking.*

Before the Conveyancing Act, 1881, the vendor retaining documents of title was bound to covenant for the production, for furnishing copies, and for the safe custody of the documents. See Sug. 452. Covenant.

By the Conveyancing Act, 1881, sect. 9, sub-sect. 8, an acknowledgment of the right to production will satisfy any liability to Acknowledgment.

give a covenant for production and delivery of copies of, or extracts from, documents. The obligations imposed by an acknowledgment are set out in sub-sects. 4 and 6, and the persons who are bound by, and who may take advantage of, the acknowledgment, are defined in sub-sects. 2 and 3. By sub-sect. 11, an undertaking for safe custody of documents, will satisfy any liability to give a covenant for safe custody. The obligations imposed by an undertaking are set out in sub-sect. 9.

What documents must be included.

The documents in respect of which the vendor is bound to covenant, or give an acknowledgment and undertaking, are those necessary to make a title for the period fixed by law or stipulation. See *Dare v. Tucker*, 6 Ves. 460; and *Cooper v. Emery*, 1 Ph. 388. It is doubtful whether the covenant, &c. need include documents which are only negative evidence of the vendor's title. In *Cooper v. Emery*, as cited in 1 Hayes on Conveyancing, 573 (ed. 5), a purchaser from an heir-at-law, whose ancestor left a will not affecting the property, was not allowed to insist that the covenant for production should include the will. But in *Stevens v. Guppy*, 2 Sim. & St. 439, a purchaser under the same circumstances was, on selling again, compelled to produce the will. Lord St. Leonards was of opinion (see Sug. 452) that if the negative evidence is in the custody of the vendor, the covenant should include it, and Mr. Dart (p. 628) approves of this view. With regard to instruments upon record, it would seem that the covenant or acknowledgment must include any copies which are in the vendor's possession or power, but not any other copies: *Cooper v. Emery*, 1 Ph. 388.

Where freeholds held of a manor are sold by the lord, subject to leases for lives granted by copy of Court roll, the lord must covenant to produce the Court rolls, prior to the date of the conveyance to the purchaser: *Earl Poulett v. Hood*, 5 Eq. 115.

Vendor who is trustee.

If the vendor was a trustee, his covenant for production was usually limited to his own acts, and to the period during which the deeds were actually in his custody. See *Onslow v. Lord Londesborough*, 10 Ha. at p. 74. Davidson, Vol. II. pp. 318 & 321, says that mortgagees rarely covenant, unless they receive part of the purchase-money, and sometimes refuse even then. The assignees of a bankrupt, were, in *Ex parte Stuart*, 2 Rose. 215,

held to be entitled, in the absence of stipulation, to qualify the covenant by a proviso determining their liability on their procuring a substituted covenant. But an ordinary vendor was not entitled to any such proviso, or to the limitation mentioned above. See Sug. 452. The acknowledgment which, since the Conveyancing Act, 1881, a vendor is entitled to offer a purchaser instead of a covenant, is limited to the time during which the vendor has possession of the deeds. See sect. 9, sub-sect. 2.

If the vendor has not possession of the deeds, he cannot give a sufficient covenant or acknowledgment and undertaking.

Vendor unable to covenant.

In the case of a sale by a mortgagor of property, part of a larger estate which is in mortgage, if the purchase-money is insufficient to pay off the mortgage, the deeds will be retained by the mortgagee. If the mortgage was before 1882 the vendor should be asked to obtain an acknowledgment by the mortgagee, and to give a covenant for safe custody himself. The undertaking under the Conveyancing Act, 1881, only applies where the person undertaking keeps the deeds; an undertaking for safe custody by the mortgagee, would probably satisfy the vendor's liability to give a covenant for safe custody (see sub-sect. 11); but it is unlikely that a mortgagee would give such an undertaking. If the vendor is unable to obtain the mortgagee's acknowledgment, the purchaser can, it is conceived, in the absence of stipulation to the contrary, rescind, if the mortgage was made before 1882. If the mortgage was made after 1881, sect. 16 applies, and no acknowledgment by the mortgagee is necessary.

Sale by mortgagor.

A condition that "the vendors shall not be required to produce any deeds not in their possession, and that all deeds of covenant for production . . . which the purchaser shall require for verifying the abstract or for any other purpose . . . shall be obtained by, and at the expense of, the purchaser requiring the same," relieves the vendor not only of the expense, but of the duty of obtaining the necessary covenants for production; and if the persons who have the deeds refuse to covenant, the purchaser must complete without a covenant for production: *Gabriel v. Smith*, 16 Q. B. 847. This construction of the words "by and at the expense of" differs from that in *Osborne v. Harvey*, 7 Jur. 229, see above, p. 331. Perhaps the distinction is that it is "reasonable" (see 16 Q. B. p. 862) that the purchaser should bear the

Conditions relieving vendor.

risk of not being able to verify the abstract at a future date, but not reasonable that he should not have it verified at all, but be bound to be satisfied with the *ipse dixit* of the vendor.

Equitable
right of
production
sufficient.

In a case where the vendor has not possession of the title deeds prior to the conveyance to himself, because he bought from some one who retained the title deeds, the old law was, that if the vendor had no covenant for their production, or had only a covenant the burden whereof did not at law run with the land in respect of which the title deeds were retained (as was the case where the covenant had been given by a person who was not seised of the legal estate), the purchaser could refuse to complete: *Barclay v. Raine*, 1 Sim. & St. 449. But now the inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title, is not an objection to the title, in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents: Vendor and Purchaser Act, 1874, sect. 2, rule 3.

(v.) *The Vendor's right to a Covenant for Production by the Purchaser.*

When pur-
chaser must
covenant.

If the vendor delivers to the purchaser title deeds, which the vendor is bound by covenant to produce to third persons, the vendor will be entitled to require the purchaser to covenant with him for the production, &c. of the title deeds, and to have the liability noticed, or endorsed on the deed of conveyance to the purchaser: Sug. 434, 435.

Conditions of
sale.

An agreement that "the title deeds and documents which are in the possession or power of the vendors shall, upon completion, be delivered to the purchasers; but as the same also relate to other estates belonging to the vendors, the purchasers shall enter into, or procure to be entered into, one or more proper and sufficient covenant or covenants with the vendors, or such other persons as they may direct, for the production and delivery of copies of the said deeds and documents," does not import that the vendors are to have a covenant which at all times, and in all circumstances, shall secure to them the production of the deeds, but merely that the vendors should have such a covenant as, according to the ordinary practice, and the views of Courts of

Equity, would be deemed to be sufficient: *Onslow v. Lord Lonsborough*, 10 Ha. 67. In that case, the land had been conveyed to the purchasers (who were trustees of a will), to the uses declared by their testator's will, viz., to the use of A. for life, remainder, &c.; the Court, without deciding the question whether it would have enforced the contract if the vendors had preferred to rescind, held that the purchasers, being releasees to uses, were in the position of trustees, and not bound to enter into the covenant for production, and that the vendors must be satisfied with the covenant of A., the life tenant.

(vi.) *The Purchaser's right to Attested Copies.*

If the purchaser has no intimation that he will not have the deeds delivered to him, he is entitled to have attested copies thereof given to him on completion: *Boughton v. Jewell*, 15 Ves. 176. As to the expense of procuring attested copies, see pp. 338 and 341 below.

CHAPTER XXXIV.

EXPENSES.

- Production.** On a sale of any property: (1) the expenses of the production and inspection of all Acts of Parliament, inclosure awards, records, proceedings of courts, court rolls, deeds, wills, probates, letters of administration, and other documents not in the vendor's possession; and (2) the expenses of all journeys incidental to such production or inspection; and (3) the expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the vendor's possession, and all attested, stamped, office, or other copies or abstracts of or extracts from, any Acts of Parliament or other documents aforesaid not in the vendor's possession, if any such production, inspection, journey, search, procuring, making, or verifying, is required by a purchaser, either for verification of the abstract, or for any other purpose, shall be borne by the purchaser who requires the same; and (4) where the vendor retains possession of any document, the expenses of making any copy thereof, attested or unattested, which a purchaser requires to be delivered to him, shall be borne by that purchaser: Conv. Act, 1881, sect. 3, sub-s. (6).
- Journeys.**
- Evidence, abstracts, &c.**
- Attested copies.**
- Stamping and registration.** The statutory condition does not, it will be observed, include the expense of stamping any unstamped or insufficiently stamped documents, or registering any documents which require registration. Such expense will, in the absence of any express condition, fall on the vendor: *Smith v. Wyley*, 16 Jur. 1136. See further on this point, pp. 240, 241.
- Abstract.** Nor does the statutory condition absolve the vendor from the expense of procuring and making an abstract of a deed not in his possession, forming part of the title for the statutory or agreed period; because the purchaser is not requiring an abstract of a particular deed as such, but merely asking for the abstract

of title, which the vendor is bound to produce. The statutory condition assumes that the vendor has shown a title, and the abstracts of deeds to which that condition refers are not abstracts of deeds forming part of the title, but abstracts of deeds relating to incidental matters, which need not, strictly speaking, form part of the abstract: *Re Johnson & Tustin*, 30 Ch. Div. 42.

So, too, tracings of plans drawn on the title deeds, and by reference to which the property is described, are part of the abstract itself, and the cost of making such tracings and furnishing them to the purchaser must, it is submitted, be borne by the vendor.

Similarly, facts material to the title, *e. g.*, deaths and births, must be mentioned in the abstract, and the expense of discovering the facts borne by the vendor; though the expense of proving these facts would, under sub-sect. (6), have to be borne by the purchaser, and it might happen that the expense of procuring the information was as great as that of proving it: See 9 Byth. & Jarm. p. 53, note.

Where there is a document the execution of which is necessary to complete the vendor's title, the vendor must bear the expense of its execution. Thus, where the vendor was a lessee bound by covenant to build to the satisfaction of the lessor's surveyor, and had not obtained a certificate that the surveyor was satisfied, he was obliged to procure the certificate at his own expense: *Re Moody & Yates*, 30 Ch. Div. 344. In such a case it is the vendor's title itself which is defective, and not merely the evidence of his title. When the vendor has once procured the document it is then, of course, in his possession, and he cannot call on the purchaser to bear any expense of production.

The Conveyancing Act, 1881, sect. 3 (6), has been held not to affect the rule in Ireland, that the vendor must, in the absence of express stipulation, bear the expense of a search in the registry: *Re Murray & Hegartz*, 15 L. R. Ir. 510 (but query).

In the absence of express stipulation, the expense of the perusal and execution of the conveyance by all necessary conveying parties must be borne by the vendor: Sug. 261. The purchaser must bear the expense of the preparation of the conveyance: *Poole v. Hill*, 6 M. & W. 835.

Conditions
as to con-
veyance.

The condition that the purchaser "shall have proper surrenders, conveyances, or assignments at his own expense," is not sufficient to relieve the vendor of the expense of procuring the concurrence of necessary parties: *Paramore v. Greenslade*, 1 Sm. & G. 541. That was a case of the sale of copyholds by a trustee, who died before completion, and it was held that, notwithstanding the condition, the trust estate had to bear the expense of the admittance of the heir of the trustee.

On a sale of copyholds under the conditions "the vendors to give such title as they now possess to extend over a period of twenty years," and "the purchaser to prepare his own conveyance and surrender at his own expense," the vendors were held bound to give the purchaser a surrender of the legal estate, and pay the fines necessary to enable them to surrender: *Whiteley v. Taylor*, 35 L. T. N. S. 187.

Length of
conveyance.

The extra expense of preparation caused by the extra length of the conveyance, owing to the release therein of incumbrances not mentioned in the particulars and conditions, would probably have to be borne by the vendor.

Outstanding
terms.

The condition "if the purchaser shall require a conveyance of any outstanding legal estate or of any outstanding term, the expense shall be borne by the purchaser," has been held not to embrace a mortgage term, which, though satisfied in one sense by the transfer of a certain sum in Court to a separate account, was not, in the strict sense, a satisfied term: *Stronge v. Hawkes*, 27 L. T. 150. Semble, such a condition only refers to the case where the purchaser gets a complete conveyance without the assignment of the term: *Ibid.*

Covenant for
production.

Such covenants for production as the purchaser can and shall require shall be furnished at his expense, and the vendor shall bear the expense of perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser: Vendor and Purchaser Act, 1874, sect. 2, rule 4.

On a sale in lots before the Act, under a condition that the largest purchaser should have the deeds and covenant to produce them to the purchasers of smaller lots, no provision being made as to expense, except in another condition, that the purchasers should bear the costs of the concurrence of necessary parties, it was held

that the expense of the covenants for production must be borne by the purchasers requiring them : *Strong v. Strong*, 6 W. R. 455.

On a sale of any property in lots, a purchaser of two or more lots held wholly or partly under the same title, shall not have a right to more than one abstract of the common title, except at his own expense : Conv. Act, 1881, sect. 3, sub-s. (7). Abstracts on sale in lots.

The expense of procuring attested copies of deeds which the vendor retained, was, before the Conveyancing Act, 1881, and in the absence of stipulation, borne by the vendor : *Boughton v. Jewell*, 15 Ves. 176. Attested copies. But the condition "the vendor shall retain the custody of the title deeds, and a covenant will be entered into for the production of such of them as are not enrolled, and for giving attested or other copies thereof to the respective purchasers at their expense," was sufficient to throw the expense on the purchaser : *Cotton v. Scudamore*, 1 K. & J. 321. In the absence of stipulation the expense is now borne by the purchaser : see p. 338, above.

CHAPTER XXXV.

FORFEITURE OF THE DEPOSIT, AND RESALE BY THE
VENDOR.(i.) *Forfeiture of Deposit.*

Forfeiture in
absence of
condition.

IN the absence of any condition, the deposit is not merely a part payment of the purchase-money, but also a guarantee that the contract shall be performed, and if the contract is not completed, owing to the purchaser's default, the deposit is forfeited: *Ex parte Barrell*, 10 Ch. 512, approved in *Howe v. Smith*, 27 Ch. Div. 89.

Conditions.

The conditions may be silent as to the forfeiture of the deposit, or may simply direct the deposit to be forfeited in case of the purchaser's default, or may also provide for the payment of damages. It is a question of construction in each case whether the deposit is to be forfeited or not: per Bowen, L. J., in *Howe v. Smith*, 27 Ch. Div. 89. "In the absence of any specific provision, the question whether the deposit is forfeited depends on the intent of the parties, to be collected from the whole instrument": *Palmer v. Temple*, 9 Ad. & E. 508, at p. 520.

In *Palmer v. Temple*, 9 Ad. & E. 508, the sale was expressed to be made in consideration of 300*l.* paid "by way of deposit and in part of" the full purchase-money, and contained a distinct clause providing that in case of non-completion the party in default should pay the other 1,000*l.* as liquidated damages. The purchaser made default. It was held that the deposit of 300*l.* was not forfeited, since the clause as to the 1,000*l.* showed it was the intention of the parties to give the vendor 1,000*l.*, and no more, by way of damages for the purchaser's default. That decision, as Cotton, L. J., says in *Howe v. Smith*, 27 Ch. Div. 89, turned on the express terms of the proviso.

In *Hoice v. Smith*, 27 Ch. Div. 89, the purchaser paid 500*l.* "as a deposit and in part payment of the purchase-money," and the agreement stipulated that in case of the purchaser's default the vendor should be at liberty to resell and recover the deficiency on the second sale and expenses as liquidated damages. The vendor resold at the same price. It was held that the purchaser could not recover the deposit.

The deposit is never regarded as a penalty or relieved against. Deposit not a penalty. "The claim to the deposit as forfeited is not a claim to a penalty, but a claim to damages for breach of the agreement, which the parties have settled at a fixed sum": per Pollock, B., in *Collins v. Stimson*, 11 Q. B. D. 142.

But a deposit differs from a sum agreed to be paid as "liquidated damages," because it is forfeited, even where the Court would construe the words "liquidated damages" as a penalty and relieve against them: *Wallis v. Smith*, 21 Ch. Div. 243.

In *Hinton v. Sparkes*, L. R. 3 C. P. 161, there was a stipulation that, if the purchaser failed to complete, the deposit of 50*l.* should be "forfeited in part of the following damages," which included a sum of 50*l.*, described as "agreed upon to be the damages ascertained and fixed on the breach hereof." The purchaser made default. It was held that though the sum of 50*l.* "liquidated damages" might be treated as a penalty and therefore relieved against, yet the 50*l.* "deposit" was forfeited in full, even though the vendor had not sustained so much damage.

Except where the money is not paid or deposited, see p. 347, it is not necessary to call it a "deposit" in the contract. Name "deposit" not necessary. If a sum styled "liquidated damages" is actually deposited, *i. e.*, placed in the hands of the vendor or of a third party to abide the event, it is a deposit, and liable to forfeiture as such, even though as "liquidated damages" it might have been treated as a penalty: see pp. 351 to 353, on the construction of the words "liquidated damages."

In the absence of agreement as to the forfeiture of the deposit, Purchaser's default must amount to repudiation. the deposit is not forfeited unless the purchaser's default is an actual or constructive repudiation of the contract. "I do not say that in all cases where this Court would refuse specific per-

formance the vendor ought to be entitled to retain the deposit. . . . In order to enable the vendor so to act, in my opinion, there must be acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract": per Cotton, L. J., in *Howe v. Smith*, 27 Ch. Div. at p. 95.

Protracted
delay.

Protracted delay in paying the purchase-money, in the face of the urgency of the vendor to complete, may amount to "constructive" repudiation. In *Howe v. Smith*, 27 Ch. Div. 89, the 24th of April was the day fixed by the agreement for completion; but the vendor's solicitor, by a letter written at the same time as the agreement, agreed that the clause of resale should not be put in force till six weeks after the 24th of April. After vainly pressing for completion, the vendor, on the 20th of June, agreed to give a month's time, the purchaser paying certain costs. The month expired without the purchaser paying the purchase-money. It was held that the vendor was justified in treating the purchaser as making default and in himself rescinding the contract, and that the deposit was forfeited.

Protestations.

The protestations of the purchaser, that he desires to complete, are of no avail if his delay is so protracted as to amount to "constructive" repudiation: *Howe v. Smith*, 27 Ch. Div. 89.

Vendor's
default.

If the purchaser repudiates the contract on the ground that the vendor's title is defective, the question arises, Was this the purchaser's default, or was it not rather the vendor's? But for the doubt caused by *Best v. Hamand*, 12 Ch. Div. 1 (see below), it might be laid down that where the vendor's title has been proved or admitted to be bad the purchaser, on discovering the defect, is entitled to recover his deposit, unless the contract contains some condition which binds him to complete notwithstanding the defect in the title. But for that decision, it might also be laid down that even the express stipulation, "if the purchaser fails to comply with these conditions the deposit shall be forfeited to the vendor," must be construed as referring to the purchaser's failure to complete where the Court would have compelled him to complete.

Condition

Failure to comply with the condition binding the purchaser

to send in his requisitions and objections within a given time as to requisitions. has been held to be not such a default on the purchaser's part as to entitle the vendor to forfeit the deposit, if the vendor has no title at all. The result of not complying with such a condition is merely that the purchaser cannot send in any more requisitions, not that he is bound to take a title which he shows to be clearly bad. In such a case it is the vendor and not the purchaser who is in default, and the deposit can be recovered by the purchaser notwithstanding the condition for its forfeiture "in case the purchaser fails to comply with these conditions:" *Want v. Stallibrass*, L. R. 8 Exch. 175.

On the other hand, the refusal of the purchaser to admit that which he was bound by the conditions to admit has been held to be such default on his part as to entitle the vendor to a forfeiture of the deposit, even though that which the condition bound the purchaser to admit was not true, and the vendor's title was consequently defective: *Best v. Hamand*, 12 Ch. Div. 1, the Court of Appeal reversing Hall, V.-C. That was a sale of land which the vendor had purchased from a railway company as surplus land. There was a condition binding the purchaser to "assume and admit that everything (if anything were necessary) was done by the company to enable them to sell the land as surplus land." The purchaser refused to complete, on the ground that the adjoining owners had not waived their right to pre-emption. The purchaser brought an action for the deposit, and the vendor subsequently rescinded and sold to one of the adjoining owners. It was held that the purchaser had broken the contract by refusing to admit that which he had agreed to admit, and was not entitled to recover the deposit. Refusal to make admissions provided for by conditions.

In that case nothing was said in any of the judgments as to whether the vendor *knew* that there had been no offer made to the adjoining owners; but it was stated in the argument (report, p. 8) that the vendor did know. Lord Justice Fry (Sp. Perf. p. 559) thinks the vendor must have known, judging from the abstract and replies to requisitions; but it is possible that at the time of the contract the vendor did not know. If he did, then, of course, the condition was bad, as wanting in *bona fides*, and, on the principle of *Re Banister*, 12 Ch. D. 131, Bona fides of vendor.

ought not to have been enforced. Lord Justice Fry (*ubi sup.*) suggests that the condition might properly be enforced to the extent of disentitling the purchaser to sue for the repayment of his deposit. This may be doubted. It is difficult to imagine any principle which would justify the Court in disregarding an express stipulation on the ground of unfairness, to the extent of relieving the purchaser from his liability to complete, and yet would not justify the Court in disregarding the same stipulation to the extent of relieving him from the forfeiture of the deposit.

Vendor
having no
title.

Even apart from the question whether the vendor knew the facts, it may be doubted whether the deposit ought to have been forfeited, since the vendor had no title to the property. The principle underlying *Want v. Stallibrass*, L. R. 8 Ex. 175, though not laid down there in express terms, is that the condition for the forfeiture of the deposit cannot be enforced if the vendor has no title at all. If the condition binding the purchaser to admit that the company had done everything necessary to enable them to sell was sufficient to force the purchaser to lose his deposit, it was sufficient to force him to complete. The condition for the forfeiture of the deposit "in case the purchaser does not comply with these conditions," means that the deposit shall be forfeited if the purchaser does not pay his purchase-money in cases where the purchaser is bound to do so, not that the deposit is to be forfeited if the purchaser refuses to complete on grounds which the Court would hold sufficient justification for such refusal.

Time not of
the essence.

If the condition says that the deposit shall be forfeited if the purchaser fails to complete within a specified time, the Court relieves against the condition unless time is of the essence of the contract: *Lennon v. Napper*, 2 Sch. & Lef. 682, at p. 684; and see above, p. 274.

Defect discovered after
purchaser's
default.

If the contract has once been put an end to in consequence of the purchaser's default, the deposit is forfeited for good, notwithstanding the subsequent discovery of a defect in the vendor's title which would have enabled the purchaser to rescind and recover his deposit. In *Soper v. Arnold*, 37 Ch. Div. 96, after the title had been accepted and the conveyance approved, the

purchaser, being unable to find the residue of the purchase-money at the date of completion, abandoned the contract. The vendor, in pursuance of the power given him by the conditions of sale, put the property up for sale, and upon the resale a defect in the title, which the defaulting purchaser had overlooked, was discovered, and the contract for resale rescinded. The purchaser on the first sale then claimed a return of his deposit, on the ground that, as the vendor had no title to the property, the contract was entered into under a "common mistake." It was held that the vendor was entitled to retain the deposit.

The trustee in bankruptcy of the purchaser, if he repudiates the contract, has no right to a return of the deposit: *Depree v. Bidborough*, 4 Giff. 479. Bankrupt purchaser.

A resale by the vendor does not entitle the purchaser to a return of the deposit, even though the vendor succeeds in obtaining the same price (*Howe v. Smith*, 27 Ch. Div. 89); or even, it is conceived, though he resells at an advance. See below, p. 350. On the right of the purchaser to have the forfeited deposit set off against the damages payable by him to the vendor, see p. 349 below. Resale by vendor.

A sum agreed to be paid as a "deposit" is, it would seem, like a sum actually deposited, liable to forfeiture in case of the purchaser's default. The fact that the deposit was not actually paid does not make it any the less a deposit. Willes, J., in *Hinton v. Sparkes*, L. R. 3 C. P. 161, at p. 166, says, "The only other question is whether the vendor is to be in any worse position because the deposit was not paid down at the time. I cannot see why the rights of the vendor should be affected by the purchaser's having committed two breaches of contract instead of one." In that case the purchaser gave an I O U for the amount of the deposit, and so was considered as having actually paid the deposit; and the vendor was held to be entitled to recover the amount of the I O U in full, although such amount exceeded the damages he had sustained. It would seem from *Wallis v. Smith*, 21 Ch. Div. 243, see per Jessel, M.R., at p. 255, that the agreement to pay a certain sum as deposit into a bank in the joint names of the vendor and purchaser makes that sum a deposit whether it is actually paid or not. "Deposit" not actually deposited.

Contract not binding.

If the contract itself is not binding on the purchaser the deposit may be recovered (but without interest), unless he has gone on with the sale and put the vendor to some expense. Thus, where there was only a parol contract the purchaser was allowed to recover his deposit: *Casson v. Roberts*, 31 Beav. 613, questioned in *Thomas v. Brown*, 1 Q. B. D. 714.

Where on receipt of the deposit the vendor signed a memorandum in the following form:—"Received of A. the sum of £80, being the deposit on account of £800, the purchase-money for the Wheatsheaf Tavern, the contract for which is now being prepared, to be signed by the vendor and purchaser when completed and ready for signature," and the purchaser refused to sign the contract when tendered him, as it contained what the Court held to be unreasonable terms, the purchaser was allowed to recover his deposit without interest, the vendor having in the meantime resold the property: *Moeser v. Wisker*, L. R. 6 C. P. 120.

Waiver in case of parol contract.

Although the contract is verbal merely, or the written agreement does not (owing to an insufficient mention of the vendor) satisfy the Statute of Frauds, the purchaser cannot recover his deposit after he has received the abstract and sent in requisitions: *Semble, Thomas v. Brown*, 1 Q. B. D. 714.

(ii.) *Resale by Vendor and recovery of Damages.*

Resale.

In the absence of any condition the vendor is, upon the purchaser's default, entitled to resell and to recover the deficiency of price on such resale as damages against the purchaser: *Noble v. Edwards*, 5 Ch. D. 378, Bacon, V.-C., observing that the remarks of Lord St. Leonards (V. & P. p. 39), were not equivalent to a denial of this right, but only a caution. "Under ordinary circumstances, where the purchaser fails to complete, without any default on the part of the vendor, the latter is entitled to recover all the expenses he has incurred in preparing for the sale, and also the loss incurred upon a resale, that is, the difference in price, if any": per Brett, J., in *Essex v. Daniell*, L. R. 10 C. P. at p. 551. The vendor who has resold is not entitled to sue the defaulting purchaser for the original purchase-money in full: *Lamond v. Davall*, 9 Q. B. 1030.

The vendor's right to damages is not necessarily satisfied by the forfeiture of the deposit. "A purchaser has no right to say that he will put an end to the agreement forfeiting his deposit": per Lord Eldon in *Crutchley v. Jerningham*, 2 Mer. 502, 506. In that case the purchaser had admitted the title and taken possession. The earlier case of *Savile v. Savile*, 1 P. W. 745, deciding that the purchaser might elect to forfeit his deposit, must be considered as overruled.

Even a stipulation that the deposit "shall be forfeited as liquidated damages" has been held not to bar the vendor's right to full damages, if he can prove that he has suffered damage beyond the amount of the deposit: *Icely v. Grex*, 6 N. & M. 467. But this decision may well be doubted, since, in *Lea v. Whitaker*, L. R. 8 C. P. 70, where the contract contained a stipulation that either party failing to complete should forfeit to the other his deposit money (already paid to a third party) "as and for liquidated damages," the purchaser was held not entitled to any damages beyond the deposit. It is difficult to understand how the same words should be construed differently, according as it is the vendor or the purchaser who is suing; if anything, it would be expected that they should be construed more strictly against the vendor. The *ratio decidendi* in *Icely v. Grex* was the very narrow interpretation which the Court put upon the words "if the purchaser shall neglect or fail to comply with any of the above conditions," which were held to import only a partial failure on the purchaser's part, and not a repudiation of the whole contract. This construction seems a most unreasonable one.

In ascertaining the deficiency on a resale under the condition credit must be given for the deposit: *Ockenden v. Henly*, E. B. & E. 485. The deposit is in its nature a part payment of the purchase-money, and, if the first sale had gone on, the vendor could not have claimed as purchase-money more than the remainder of the purchase-money after deducting the deposit. By the purchaser's default he has lost, not the full purchase-money, but the balance after deducting the deposit. The deficiency on a second sale is, therefore, the difference between that balance which he would have received if the purchaser had com-

"Liquidated damages."

Amount of deficiency on resale.

pleted and the price received at the second sale. *Ockenden v. Henly* is approved in *Essex v. Daniell*, L. R. 10 C. P. at p. 554, and *Howe v. Smith*, 27 Ch. Div. at p. 105.

No resale.

The vendor's right to damages for the expenses of and incidental to the sale which the purchaser's default has rendered abortive is cumulative to his right to the forfeiture of the deposit, if the vendor makes no attempt to resell: *Essex v. Daniell*, L. R. 10 C. P. 538.

Profit on resale.

If the purchaser has made default and the vendor has resold and obtained a higher price, the purchaser cannot call for an account of the surplus: per Lord Eldon, in *Ex parte Hunter*, 6 Ves. 94, at p. 97.

Deposit forfeited though no loss on resale.

If the vendor has resold at the same price (or even it is conceived if he has resold at a higher price) the deposit is none the less forfeited: *Howe v. Smith*, 27 Ch. Div. 89. According to Fry, L. J., *ibid.* p. 105, the default of the purchaser "affords the vendor an alternative remedy, so that he may either affirm the contract and sell under this clause, or rescind the contract and sell under his absolute title. If he act under the clause, he must bring the deposit into account in his claim for the deficiency; if he sell as owner, he may retain the deposit but loses his claim for the deficiency under the clause in question." The option so given to the vendor is not, however, it is conceived, one which he must openly adopt before his resale: in other words, he may await the result of the resale before he makes up his mind whether he is selling under the power of resale given him by the condition or under his power to sell as absolute owner, treating the contract as repudiated by the purchaser. It might be suggested that the distinction made by Fry, L. J., does not exist, because the vendor, even if selling under the condition, is selling as on a repudiation of the contract by the purchaser, and the condition merely expresses the power of resale which exists independently of the condition.

"Liquidated damages."

The condition enabling the vendor to resell usually provides that the vendor shall be entitled to recover any deficiency on a resale as well as the expenses of the original sale "as and for liquidated damages."

Penalty or

Sometimes other matters are mixed up in the same condition

so that there results a doubt whether the words "liquidated damages" are to be construed literally. The following rules may be laid down for the construction of the words "liquidated damages," with this caution, that the present tendency of the Courts is to hold men to their bargains and take them to mean what they have expressly written in their contracts. liquidated damages.

1. Where the sum is to be paid for breach of stipulations, all or some of which are or one of which is for the payment of a sum of money of less amount than the sum contracted to be paid as "liquidated damages," the sum will be treated as a penalty, notwithstanding that it is called liquidated damages. See 8 & 9 Will. 3, c. 11, s. 8, and the remarks of Bramwell, J. A., in *Re Newman*, 4 Ch. Div. 724. The Court will not sever the stipulations: *Kemble v. Farren*, 6 Bing. 141, and remarks on that case in *Re Newman*, 4 Ch. Div. 724. For payment of less sum.

In one case the contract contained a stipulation that 5,000*l.* deposit should be paid, 500*l.*, part thereof, to be paid on the execution of the contract, and a stipulation that if the purchaser should commit a substantial breach of the contract the deposit of 5,000*l.* should be forfeited, and if it had not already been paid 5,000*l.* should be paid as liquidated damages. The sum of 500*l.*, part of the deposit, was not paid, and the purchaser failed to carry out the contract. It was held that the non-payment of the 500*l.* was not a breach for which the 5,000*l.* was to be paid as liquidated damages, because the parties to the contract did not contemplate its non-payment, and therefore the rule as to relief being given against "liquidated damages" for the breach of various stipulations, one of which is the payment of a less sum, did not apply: *Wallis v. Smith*, 21 Ch. Div. 243.

2. Where a large sum is to be paid for the breach of one or more stipulations (none of which is the payment of a less sum of money), and it is clear to the Court that the amount of actual damage in the case of a breach of one of such stipulations must of necessity, or will in all probability, be small, it seems that the sum will be treated as a penalty, even though it is called liquidated damages. There are conflicting *dicta* on this point. In *Betts v. Burch*, 4 H. & N. 506; *Kemble v. Farren*, 6 Bing. 141, and *Wallis v. Smith*, 21 Ch. Div. 243, it was thought that For trivial breach.

the sum would be treated as a penalty: but as Jessel, M. R., at p. 257 of that case, and Cotton, L. J., at p. 270, pointed out, the matter is still open to discussion. On the other hand, in *Reilly v. Jones*, 1 Bing. 302, where there were several stipulations, and the contract provided that "either of them" (the contracting parties) "not fulfilling all and every part, the party not fulfilling shall pay to the other the sum of 500*l.* hereby settled and fixed as liquidated damages," it was held that the sum of 500*l.* was not a penalty. There seems to be no reason in principle why the Court should not in construing the condition referred to in rule 2 limit the payment of the sum fixed as "liquidated damages" to a breach of the main agreement, which is probably the intention of the parties. In *Reilly v. Jones* it might have been thought that the language of the contract negatived the presumption that liquidated damages were to be paid only in the event of a substantial breach, and that the case stood apart from any rule applicable to ordinary cases. The decision is open to grave doubt, but is approved of in *Lea v. Whitaker*, L. R. 8 C. P. 70, at p. 76, on the ground that the damages were really payable on a breach of the main object of the agreement.

Where the sum fixed as liquidated damages for the breach of a contract, containing stipulations of varying importance, is only payable if the purchaser commits a "substantial breach," the Court will construe "liquidated damages" literally: *Wallis v. Smith*, 21 Ch. Div. 243.

For unascertainable damages.

3. Where the sum is to be paid for a breach of several stipulations of different degrees of importance, and the damage for the breach of each stipulation is unascertainable, or not readily ascertainable, and would in all probability not be insignificant compared with the sum fixed, the Court will treat the sum as liquidated damages and not a penalty: *Wallis v. Smith*, 21 Ch. Div. 243. There is a dictum of Lord Coleridge to the contrary, in *Magee v. Lavell*, L. R. 9 C. P. 107, which is approved by Lord Bramwell in *Re Newman*, 4 Ch. Div. 724; but this dictum was dissented from in *Wallis v. Smith*, by Jessel, M. R., who says that the dictum is opposed to what Tindal, C. J., says in *Kemble v. Farren*, 6 Bing. 141.

Where the sum styled "liquidated damages" is placed in the hands of the vendor or of a third party to abide the event, this is a deposit and not a penalty, and the Court will not relieve against the forfeiture of the deposit: see p. 343. Sums deposited.

Trustees who neglect to enforce the condition as to re-selling and recovering the deficiency from the defaulting purchaser, are not necessarily guilty of a breach of trust: *Thomson v. Christie*, 1 Macq. 236. Trustees not enforcing the condition.

If under the condition for forfeiture of the deposit the vendor in an action for specific performance claims alternatively by his writ a declaration that he is entitled to forfeit the deposit, the Court will, on his election, make the declaration, the plaintiff paying the costs of the action: *Kingdon v. Kirk*, 37 Ch. D. 141. The alternative claim must appear in the writ, it is not sufficient to insert it in the statement of claim: *Ibid*. Procedures.

CHAPTER XXXVI.

SALE IN LOTS.

Timber. A DECLARATION appended to certain lots that the timber is to be paid for implies that the timber on the other lots is not to be paid for, and this implication is not removed by a condition in general terms that the timber is to be paid for at a valuation : *Higginson v. Cloues*, 15 Ves. 516.

Easements. On a sale of land in lots which had formerly been held by different tenants, with a licence for the tenant of lot 5 to have a supply of water from lot 6, a condition that "each lot is sold subject to the rights of way and water and other easements (if any) subsisting thereon," was held not to entitle the vendor to reserve, in the conveyance to the purchaser of lot 6, a right of water in favour of the purchaser of lot 5 : *Russell v. Harford*, 2 Eq. 507. That would have been creating a new easement, which is not what the condition contemplated : see *Daniel v. Anderson*, 31 L. J. Ch. 610. For easements to be implied from the sale plan, see above, p. 95.

Covenants in lease. On a sale in two lots of property held under one lease containing special covenants, the conditions provided for apportionment of the rent, but not for the protection of each purchaser against the non-performance by the other of the special covenants, except by stipulating that each purchaser should execute a bond for 1,000*l.* to the vendor to indemnify him against the rent and covenants. The purchaser of one of the lots objected to complete, on the ground that he might lose the property through the default of the other. He had inspected the lease at the sale, and was therefore held to be affected with notice of the covenants, and bound to complete : *Paterson v. Long*, 6 Beav. 590.

The condition "the estates are subject to the payment of 120% ^{Annual payments.} a year to the curate of N., but the same, and the perpetual annual payment of 20% to the hospital of C., are in future to be charged upon and paid by the purchaser of lot 1 only," does not give the purchasers a right to have their lots absolutely exonerated from these payments, but only a right to an indemnity by the purchaser of lot 1: *Casamajor v. Strode*, 2 Swanst. 347.

Restrictions mentioned in conditions on a sale in lots may be ^{Restrictions.} meant by the vendor, and understood by the purchasers, either as for the benefit of the vendor only, or of the purchasers *inter se*. It is a question of fact in each case, and if the intention and undertaking are clear, the purchasers can enforce the restrictions against each other. If there is a general building scheme, the inference is clear that the purchasers are to be entitled to the benefit. But even apart from the general building scheme, if the vendor retains no portion of the land the inference is that the purchasers were intended to have the benefit of the restrictions: *Nottingham, &c. Co. v. Butler*, 15 Q. B. D. 261; 16 Q. B. D. 778.

On a sale in lots subject to stipulations as to fencing, building, &c., there was a condition in the following words: "The vendor reserves the right of selling the unsold lots or any of them . . . either subject to or not subject to the stipulations as to fencing and other stipulations contained in the particulars or these conditions." Some of the lots were not sold. The Court held that the unsold lots were not subject to the stipulations, and that the vendor was entitled to have a statement inserted in the conveyances of the lots sold (or rather, it would seem, in the deed of covenant which the purchasers had to execute; see p. 322, above) showing the freedom of the unsold lots from the said stipulations: *Sidney v. Clarkson*, 35 Beav. 118. As to the form of the conveyance of the sold lots, see above, p. 322.

A condition that the purchaser of each lot should be a party ^{Purchaser to be party to other assignments.} to the assignments to the purchasers of the other lots does not render the purchaser of one lot a necessary party to an action by the vendor for specific performance against the purchaser of another lot: *Paterson v. Long*, 5 Beav. 186.

Sale of
leaseholds
by way of
sub-demise.

On a sale of leaseholds in lots by way of underlease the purchaser of any lot may be required to covenant to perform all the covenants in the original lease, so far as they affect his lot: *Browne v. Paul*, 26 L. T. 232.

Restrictive
covenants,
some lots
unsold.

On a sale in two lots there was a condition that each purchaser should, in the deed of conveyance to him of his lot, at his own cost enter into a covenant with the vendor and the other purchaser restrictive of the user of such lot, and that the vendor on his part would (if required by either purchaser, but at the cost of such purchaser) enter into a similar covenant with the purchasers restrictive of the user of other property not comprised in the sale. Lot 1 was not sold. The purchaser of lot 2 refused to enter into any restrictive covenant, on the ground that there was no purchaser of lot 1 to covenant with *him*. It was held that the purchaser was bound to covenant, as stipulated in the conditions, the vendor covenanting in respect of lot 1, and therefore binding any future purchaser of that lot: *Re Mordy and Cowman*, 51 L. T. N. S. 721.

Abstracts.

"On a sale of any property in lots, a purchaser of two or more lots held wholly or partly under the same title shall not have a right to more than one abstract of the common title, except at his own expense": Conv. Act, 1881, s. 3, sub-s. (7).

Title deeds.

Where two or more lots are held wholly or partly under the same title, in the absence of stipulation the purchaser of the largest lot in value is entitled to the deeds belonging to the common title, and must give the purchasers of the other lots acknowledgments and undertakings (formerly covenants for production): *Griffiths v. Hatchard*, 1 K. & J. 17. But a condition that the purchaser of the "largest lot" shall be entitled to the possession of the title deeds is construed to mean the largest in superficial area: *Ibid.*

"Largest
lot."

Where the purchaser of the "largest lot" is by the conditions to have the title deeds, the purchaser of the largest single lot will have the title deeds, in preference to the purchaser of the largest aggregate amount (in area or value) made up by several lots: *Scott v. Jackman*, 21 Beav. 110.

Attested
copies.

Where one purchaser gets the common title deeds the other purchasers are, in the absence of stipulation, entitled to attested

copies thereof at the vendor's expense, even where the expense would be very great, as on a sale in 144 lots: *Dare v. Tucker*, 6 Ves. 460. The Conveyancing Act, 1881, s. 3, sub-sect. (6), merely refers to the case of the vendor retaining the title deeds.

On a sale by the Court under a condition that the largest purchaser shall have the deeds, and covenant to produce them to the other purchasers, the expense of the covenant for production must be borne by the purchaser requiring the covenant, and not by the vendor: *Strong v. Strong*, 4 Jur. N. S. 943.

Where the vendor agrees to hand over the common title deeds to the purchaser of the largest lot in amount, but the conditions are silent as to what is to take place if one lot is unsold, it would seem that the Vendor and Purchaser Act, 1874, s. 2 (5), allowing the vendor to retain title deeds (see p. 333), is excluded, and the purchaser of the largest lot is entitled to the deeds: *Re Doherty*, 15 L. R. Ir. 247. Some lots unsold.

CHAPTER XXXVII.

SALES BY TRUSTEES AND MORTGAGEES. DEPRECIATORY CONDITIONS.

Sales before
24 Dec. 1888.
Duty of
trustees
and mort-
gagees.

(i.) *The Law applicable to Sales made before 24th December, 1888.*

TRUSTEES and mortgagees are bound to exercise their trust or power of sale in a provident manner. As regards a mortgagee the fiduciary character is only secondary, the power of sale being given to him for his own benefit to enable him the better to realize his debt, and it has been said that, in the absence of fraud or collusion, the Court will not interfere with a disadvantageous sale by a mortgagee: *Warner v. Jacob*, 20 Ch. D. 220.

Interference there meant probably interference by injunction: see further, p. 359, below. It would seem from *Falkner v. Eq. Rev. Soc.*, 4 Drew. at p. 355, that the mortgagee's improvidence in the conduct of the sale is sufficient to justify some interference by the Court, whether rescission at the instance of the purchaser, or (*qu.*) damages to the mortgagor.

Special con-
ditions if
necessary.

Trustees and mortgagees must, on the one hand, protect the title by special conditions where necessary, and must, on the other hand, take care not to employ unnecessary conditions of a depreciatory character.

Employment
of counsel.

Trustees are entitled to employ counsel to draw the conditions of sale. See *Ex parte Levis*, 3 M. D. & D. 173.

"Depre-
ciatory con-
ditions."

Unnecessary depreciatory conditions are generally termed briefly "depreciatory conditions." The word "trustee" in the rest of this chapter includes mortgagee and other persons having a fiduciary character, and *cestui que trust* includes mortgagor.

Tenant for
life.

It may be noted here that a tenant for life selling under the Settled Land Act, 1882, has a fiduciary character: see sect. 53. But it would seem from sect. 54 that, even if the life tenant has used depreciatory conditions, a purchaser dealing with him in

good faith would be protected against the persons entitled under the settlement, since that section precludes them from objecting that the purchase-money was not the best price obtainable. It is true that in *Dance v. Goldingham*, 8 Ch. 902 (see below, p. 361), the fact of the price being the best obtainable was held to be irrelevant where depreciatory conditions have, in fact, been used. But that decision, it is submitted, rested on the implied belief of the Court that the proof as to the price was not conclusive, and that no proof could be conclusive except a sale unfettered by depreciatory conditions. The right of *cestuis que trust* to object to a sale because of depreciatory conditions exists only by virtue of their right to object that the trustee has not sold at the best price. If they are precluded (as by sect. 54, in the case of a *bond fide* sale they are precluded) from raising the latter objection, it would seem that their ancillary right of objecting to depreciatory conditions also disappears.

A railway company selling surplus land has no fiduciary character, and may employ the same conditions as any other vendor: *Re Higgins & Hitchman*, 21 Ch. D. 95. Railway company.

If the trustee have used depreciatory conditions unnecessarily, or otherwise sold improperly, the *cestui que trust* may, if the sale is completed, recover damages from the trustee for the breach of trust, or set the sale aside as against the purchaser. In some cases where the sale had not been completed the Court restrained the sale by injunction; but it must be a very strong case to induce the Court to interfere in this way. In the case of a sale by the mortgagee, the Court will not interfere by injunction, except upon the terms of the mortgagor paying into Court the sum sworn by the mortgagee to be due (*Macleod v. Jones*, 24 Ch. Div. 289), unless the mortgagee is the solicitor of the mortgagor, in which case the Court will interfere to prevent oppression (*Ibid.*); or unless the Court can see from the mortgage deed itself that the amount sworn to be due cannot be due: *Hickson v. Darlow*, 23 Ch. Div. 690. Remedy of *cestuis que trust*.
Mortgagor.

If, therefore, depreciatory conditions have been used unnecessarily the purchaser may refuse to complete, unless the trustee can obtain the concurrence of the *cestui que trust*, on the ground that by employing such conditions the trustee has become Remedy of purchaser.

unable to make a good title. Even where it is doubtful whether the *cestui que trust* would be able to upset the sale, this doubt is sufficient to entitle the purchaser to refuse to complete. See *Rede v. Oakes*, 4 D. J. & S. 505, at p. 515. If the contract is rescinded at the purchaser's instance, because of the depreciatory conditions, the trustee will not be entitled to recover damages from the purchaser, because the *cestui que trust* whom the trustee represents is not injured by the contract being broken off: per Bowen, L. J., in *Dunn v. Flood*, 28 Ch. Div. at p. 593.

Discretion
given by
Conv. Act,
1881, s. 35.

The Conveyancing Act, 1881, s. 35, empowers trustees in whom is vested a trust for sale, or power of sale, of any property created by an instrument coming into operation after the 31st December, 1881 (unless a contrary intention is expressed in the instrument creating the trust or power), to sell "subject to any such conditions respecting title or evidence of title or other matter as the trustees think fit;" and sect. 19 empowers a mortgagee of any property, where the mortgage is made by deed executed after 31st December, 1881 (unless a contrary intention is expressed in the mortgage deed), to sell "subject to such conditions respecting title or evidence of title or other matter as he (the mortgagee) thinks fit."

Must be
reasonably
exercised.

Large though the discretion reposed in trustees and mortgagees by this Act is, it must be exercised in a reasonable and proper manner: *Dunn v. Flood*, 28 Ch. Div. 586. "However large may be the power of trustees under their trust deed to introduce conditions limiting the title, and other special conditions, which have, or are calculated to have, a depreciatory effect on the sale, they are bound to exercise them in a reasonable and proper manner—they must not rashly or improvidently introduce a depreciatory condition for which there is no necessity:" per James, L. J., in *Dance v. Goldingham*, 8 Ch. 902.

Test of
"depreciatory
conditions."

The test of a depreciatory condition is, "Would a prudent and reasonable owner selling in his own right impose such a condition?" *Falkner v. Equitable Reversionary Society*, 4 Drew. at p. 355. The fact that the condition in question is usually inserted is not conclusive (see *Dunn v. Flood*, 28 Ch. Div. at pp. 592 and 593), because men do not always act with carefulness and prudence. But not more than ordinary prudence is

required ; the trustee is not bound to show that he has exercised his discretion in the conduct of the sale in the manner most favourable to the interests of the *cestui que trust*. See *Borell v. Dann*, 2 Ha. 440, at p. 455.

Where the *cestui que trust* attempts to upset the sale after the conveyance to the purchaser, the validity of the sale appears sometimes to be made to depend on the question whether the purchaser had notice of the alleged breach of trust. In *Borell v. Dann*, 2 Ha. at p. 452, the question was "whether circumstances attending the sale came to the knowledge of the purchaser such as would have satisfied an honest man using reasonable caution that in accepting a conveyance from the assignees he was concurring with them in a breach of trust." In matters of title, constructive notice is sufficient, but in matters collateral to the title, the notice, it seems, must be actual, not constructive: *Ibid.* p. 449. The fact that the completion of the sale was hurried on by the purchaser after notice that the *cestui que trust* intended to impeach the sale, affords no reason for impeaching the sale, though it would incline the Court to scrutinize the circumstances of the sale with greater jealousy: *Borell v. Dann*, 2 Ha. at p. 448.

Notice to purchaser that sale is a breach of trust.

If depreciatory conditions have been used, the Court will not inquire whether the property has in fact sold for less than its value. James, L. J., in *Dance v. Goldingham*, 8 Ch. 902, at p. 910, says:—"Then it is said that this condition has not in effect depreciated the sale, because it is shown that the full value has been given for the property. Upon that point there is a large amount of contradictory evidence, some witnesses saying that more would have been given, and others saying that more would not have been given, and that the full price was obtained. That is precisely the thing which the Court cannot inquire into. The *cestuis que trust* have a right to have this property sold without anything being done which is calculated to depreciate it; and whether the effect which this condition was calculated to produce was or was not produced, it is impossible for the Court satisfactorily to determine, because the Court cannot know how many people were deterred by such a clause as this from bidding or attending the sale. No doubt

Property selling for full value.

this clause would absolutely preclude one class of persons from attending the sale, namely, that class of purchasers who had trust moneys for investment in the purchase of land."

So, too, Bowen, L. J., in *Dunn v. Flood*, 28 Ch. Div. 586, at p. 593: "It was argued that the trustees got a good price at the auction, but that is not the point; the question is whether it might not have been a better one? By showing the number of those who came to the auction to bid, how can we draw any inference as to the number of those who stayed away?"

Statutory
conditions.

The conditions of sale implied by virtue of the Conveyancing Act, 1881, s. 3, are proper conditions for a trustee, and he may sell without excluding their operation. See sect. 66.

Trustees need not exclude the Vendor and Purchaser Act, 1874, s. 2. See sect. 3 of that Act.

Trustees may sell in the manner and subject to the conditions mentioned below, unless the trust deed or mortgage expressly directs the contrary.

Sale in lots.

Trustees may sell in lots. See Lord Cranworth's Act (23 & 24 Vict. c. 145), s. 1, and the Conveyancing Act, 1881, ss. 19, 35. Where the trust was created before the 29th August, 1860, trustees may sell in lots if the auctioneer or other experienced person recommends that course: Lewin, p. 437 (ed. 1885).

Reserved
bidding.

Trustees may fix a reserved bidding: *Re Peyton's Settlement*, 30 Beav. 252. And it would seem that it is their duty to do so: *Bramley v. Alt*, 3 Ves. at p. 628; and *Campbell v. Walker*, 5 Ves. at p. 680.

Trustees may buy in, if by the conditions they reserve the right to bid: Lord Cranworth's Act (23 & 24 Vict. c. 145), ss. 1, 2; Conveyancing Act, 1881, ss. 19, 35.

Where the trust was created before the 29th August, 1860, trustees who had fixed no reserve could not buy in: *Taylor v. Tabrum*, 6 Sim. 281.

Deposit.

Fixing the amount of the deposit at less than 10l. per cent., and accepting payment of deposit by cheque in lieu of cash, are not negligent acts on the part of a mortgagee, so as to deprive him of his costs of an abortive sale: *Farrer v. Lacy*, 31 Ch. Div. 42.

A condition fixing the deposit at 25% per cent. is not depreciatory: *Roberts v. Boson*, 3 L. J. Ch. 113.

Trustees may not require the purchaser to accept an unnecessarily short title: they may not cut down the length of title unless it is necessary on the ground of complications in the earlier title or on the ground of expense. Commencement of title.

In *Rede v. Oakes*, 4 D. J. & S. 513, it was considered doubtful whether a condition that as to part of the property (not specifying that the part was only a small portion of the whole, and not essential to the enjoyment of the rest of the property) a seventeen years' title should be accepted, was depreciatory or not.

A condition in a sale made in 1855 that the abstract of title should commence with a conveyance from E. B., dated 1840, who, in 1839, had purchased from the Board of Ordnance, is not depreciatory: *Kershaw v. Kalow*, 1 Jur. N. S. 974 (decided on motion for an injunction to restrain a sale by a mortgagee).

Trustees selling in 1872 gave as the root of title the conveyance to themselves, dated 1858, which was, so far as they were concerned, a voluntary deed, and stipulated that "no earlier or other title should be called for or required except at the purchaser's expense." There was a deed of 1819 which ought to have formed the root of title, but it had been lost. It was held, that the condition was depreciatory, and that the trustees ought to have commenced their title with the deed of 1819, which they ought to have found, or else have procured a copy, or made the recital in the deed of 1858 evidence, and offered a statutory declaration as to possession in accordance with the title: *Dance v. Goldingham*, 8 Ch. 902. Title commencing with voluntary deed.

A ten years' title is not unreasonably short if there are many lots held under the same title, and each lot is small: *Dunn v. Flood*, 28 Ch. Div. 586. Ten years' title.

On a sale by the assignees of a bankrupt, a condition that the vendors should not be required to do more than show the conveyance of the estate to themselves from the provisional assignee, was held not to be depreciatory, as the fact of the estate being in mortgage for large sums of money, very recently advanced, would explain the necessity for the condition, and No title to be shown.

prevent it from having a depreciatory effect: *Borell v. Dann*, 2 Ha. 440.

General
condition as
to derivative
leases.

A condition on the sale of leaseholds in lots that no objection was to be made that any lease was an underlease, or that the premises were held on the same lease with other property, or that the same were liable for superior rents or covenants, is a depreciatory condition in the case of any lot which is held under an original lease: *Re Rayner's Trustees and Greenaway*, 53 L. T. N. S. 495.

All recitals.

A condition that every recital in any abstracted document shall be conclusive evidence is a depreciatory condition, unless justified by very special circumstances: *Dunn v. Flood*, 25 Ch. D. 629 (this point was not mentioned on appeal). In *Smith v. Watts*, 28 L. J. Ch. 220, such a condition was used by Mr. Hayes, the conveyancer, and no objection taken to it as depreciatory.

Recitals
fifteen years
old.

A condition that all recitals, statements and conclusions in any deed fifteen years old or upwards are to be taken as proved without further evidence, is not, it would seem, depreciatory: *Kershaw v. Kalow*, 1 Jur. N. S. 974.

Twenty years
old.

As to recitals twenty years old trustees may rely on the Vendor and Purchaser Act, 1874, s. 2 (2).

Recitals, &c.,
thirty-five
years old.

A condition binding the purchaser not to require evidence "of any birth, marriage, death, time of death, intestacy, heirship, survivorship, matter of pedigree, failure of issue, representation or other fact, where the same should have been stated, taken notice of or recognized in any deed or document bearing date upwards of thirty-five years ago," is not depreciatory: *Tanner v. Smith*, 4 Jur. 310, at p. 312.

Condition as
to tenancies,
easements,
and quit rents.

A general condition against tenancies, easements and quit-rents, was held depreciatory under the following circumstances: Land was sold in lots for building. There was a condition that the property was sold "subject to the existing tenancies, restrictive covenants, easements, quit rents and other incidents of tenure (if any)," and that "the several purchasers should covenant to perform the restrictive covenants comprised in abstracted documents, and to indemnify the vendors against the conse-

quences of the breach of any such covenants." The sale was also made subject to certain "general conditions" restricting the user of the property. The abstracted documents contained no other restrictive covenants than those set out in the "general conditions." There were no tenancies, easements or other covenants affecting the property. There was no condition allowing compensation: *Dunn v. Flood*, 28 Ch. Div. 586.

A condition that "the purchaser shall not require any Identity. evidence of identity as to the parcels contained in the deeds of 1839 and 1840" (*i. e.*, dated fifteen years before the sale), "corresponding with the description in the particulars of the property now sold," was held under special circumstances not to be depreciatory: *Kershaw v. Kalow*, 1 Jur. N. S. 974. In that case the greater part of the land had been covered over with cottages since 1840, and the mortgagor himself, who was moving for an injunction to restrain the sale, had since the mortgage disputed whether the mortgage included the front gardens, through which alone access could be had to the cottages.

A condition allowing compensation is, it seems, a proper condition for trustees to employ. Condition allowing compensation.

In 1 *Prideaux*, 38 (11th ed.), it is said a trustee may and ought to insert a condition allowing compensation. In 2 *Bythewood & Jarman*, 734 (4th ed.), it is said that the usual plan is for trustees to insert a condition that there shall be no compensation, but that a mortgagee may insert a condition for compensation. In *Dunn v. Flood*, 28 Ch. Div. 586, *Baggallay*, L. J., speaks of a condition for compensation as being usual (see p. 591), and so far from such a condition being improper on a sale by trustees, all three judges in the Court of Appeal treated the absence of a condition for compensation as tending to make the other special conditions depreciatory.

However, although the condition is not improper or depreciatory, it does not follow that the Court will enforce it literally. Not always enforced. If the misdescription for which compensation is sought was caused by negligence (*i. e.*, the want of the ordinary care of a prudent owner), completion of the sale with compensation would be a breach of trust. In such a case the Court would no doubt, at the instance of the *cestui que trust*, set aside the sale unless the

purchaser paid the full purchase-money, or at any rate the full value of the property. And even if the purchaser chose to risk an action by the *cestui que trust* the Court would not consent to further a breach of trust by allowing the trustees to give compensation, so as to reduce the purchase-money below the real value of the property.

There are, indeed, some expressions in *White v. Cuddon*, 8 Cl. & F. 766, which seem to show that trustees never can give compensation. See p. 135. But it seems more correct to say that even where the misdescription is caused by the trustees' negligence the Court will give effect to the condition allowing compensation, to the extent of reducing the purchase-money to the real value of the land at the date of the contract. Thus, in *Re Chifferiel*, 40 Ch. D. 45, the Court held that the purchaser was entitled to the difference between the actual value at the date of the sale and the price paid. Perhaps the more correct course would be to ascertain the amount of compensation for the misdescription, and then to reduce the purchase-money by that amount; provided that the sum eventually paid by the purchaser should not be less than the actual value of the land at the date of the sale.

Misdescription not caused by negligence.

If the misdescription is not caused by negligence, but by a slip or accident, such as could not have been avoided by a prudent owner exercising ordinary care, the Court would probably give effect to the condition for compensation.

Expenses.

A condition throwing the expense of copies, &c., on the purchaser, was held proper in *Hobson v. Bell*, 2 Beav. 17. Such a condition is now unnecessary, because of Conv. Act, 1881, s. 3.

Rescission.

Trustees may employ a condition enabling them to annul the sale if the purchaser insists on requisitions which the vendor cannot comply with (*Falkner v. Equitable Reversionary Society*, 4 Drew. 352), or which the vendor is unable or unwilling to comply with: *Tanner v. Smith*, 4 Jur. 310, 312.

Condition for resale.

On a sale by trustees, with a condition enabling them to resell in case of the purchaser's default, and recover the deficiency and expenses against the defaulting purchaser, the neglect to enforce the condition is not necessarily a breach of trust: *Thomson v. Christie*, 1 Macq. 236.

A trustee may stipulate that the purchaser shall not require any other person than the vendor to join in the conveyance: *Hobson v. Bell*, 2 Beav. 17 (sale by a mortgagee). Conveyance.

A trustee who has no power to give receipts may stipulate that his receipt shall be a sufficient discharge for the purchase-money, and that the purchaser shall not require the concurrence of the *cestui que trust*: *Wilkinson v. Hartley*, 15 Beav. 183; and see *Groom v. Booth*, 1 Drew. 548.

A trustee may stipulate that he shall only covenant that he has not incumbered.

See further as to the form of the conveyance, pp. 318—329.

Trustees in describing the property must take care not to make any untrue statement tending to depreciate its value, or omit any matter tending to increase its value. Particulars of sale.

On the sale of a reversion the mortgagee described the life-tenant as aged "thirty years or thereabouts." This was held by Lord Cottenham, reversing Knight-Bruce, V.-C., not to be so loose a description as to make the sale a breach of trust: *Jones v. Matthie*, 16 L. J. Ch. 405.

On the sale of a manor the omission to insert manorial rights of no more than nominal value, or the right to quit rents of small amount, to which the title of the *cestuis que trust* was not clear, was not held to make the sale a breach of trust: *Borell v. Dann*, 2 Ha. 440.

The assignee of an insolvent debtor selling the bankrupt's life estate in land omitted to mention that it was unimpeachable for waste, the fact being that all the timber of any value had been felled, and there were no mines on the property, so that the value of the privilege of committing waste had become merely nominal. The sale was attacked by the bankrupt, but it was held that the misdescription was not a breach of trust: *Borell v. Dann*, 2 Ha. 440.

If trustees sell jointly with other vendors, they must take care that depreciatory conditions necessary for one property, but not for the other, are restricted in their application to that property which requires them. Thus, if the trust property has a long title, and the other property a short title, it must distinctly appear that the condition limiting the short title is confined to Joint sale.

the other property, otherwise the sale by the trustees may be upset as a breach of trust: *Rede v. Oakes*, 4 D. J. & S. 505, at p. 515.

Trustees may not join in selling with other persons unless they can thereby secure a higher price. Sometimes it is obvious, and requires no proof, that the joint sale is beneficial; as in the case of a house belonging to trustees and a garden and forecourt belonging to somebody else; or a divided portion of a house belonging to trustees and the rest of the house to somebody else; or where the trustees are the owners of a piece of land in the centre of a park or pleasure ground, or a piece in the centre of a courtyard, or of an undivided share of land, or are the owners of a life interest or a reversion. See *Re Cooper and Allen*, 4 Ch. D. 802, at pp. 816, 817. Where it is not obvious that a joint sale is beneficial, the evidence of a competent person (*e. g.*, a surveyor) to that effect will be required. Jessel, M. R., in *Re Cooper and Allen*, 4 Ch. D. at p. 820, says if the trustee got the opinions of three valuers he might act upon them; but it is probably not necessary to have so many as three.

Apportionment of purchase-money.

Trustees selling jointly with others must take care to have the purchase-money apportioned before the completion of the purchase, because it is their duty to take care to receive their proper share of the purchase-money. If the trustees take proper advice as to the share of the purchase-money to which they are entitled, and, acting under that advice, apportion the purchase-money, the *cestuis que trust* cannot complain that the property has been sold at an undervalue, even though they obtain the opinion of other valuers that the trustees ought to have received a larger share of the purchase-money. And even if the apportionment has not been made in a fair and reasonable manner, so that as between the trustee and the *cestuis que trust* it may be impeached, the purchaser is safe unless he has notice. Per Jessel, M. R., in *Re Cooper and Allen*, 4 Ch. D. 802, at pp. 816 and 818.

Apportionment need not be mentioned in conditions.

It is not necessary that the purchaser should be informed by the particulars or conditions of sale how the purchase-money will be apportioned. If a proper apportionment is made before the completion of the sale, that is soon enough. See *Re Cooper*

and *Allen*, 4 Ch. D. at p. 819. Jessel, M. R., there disapproved of the remarks in *Rede v. Oakes*, 4 D. J. & S. 505, at p. 514, where Turner, L. J., asked, "Do the terms of the contract furnish the means of ascertaining upon any fair and reasonable basis the proportion of the proceeds of the sale which ought to be attributed to the trust properties?" In *Morris v. Debenham*, 2 Ch. D. 540, Malins, V.-C., also expressed doubt as to *Rede v. Oakes*.

Where, on a sale by the Court, trustees of two properties held by them upon trust for sale, one under a will and the other under the testator's settlement, sold the two together without apportioning the purchase-money, the purchaser's objection that the two properties ought not to have been sold together for a lump sum was overruled; but by the indulgence of the Court provision was made for apportioning the purchase-money in Chambers: *Cavendish v. Cavendish*, 10 Ch. 319.

Sale of two properties by same trustees.

The proper way to apportion the purchase-money between a life estate and a reversion is to value both the life estate and the reversion, and divide the actual price in the proportion of the value of the life estate and reversion. This is clear, because the two sold together fetch more than if sold separately; if then the life estate is first valued, and the value so found is deducted from the purchase-money and the residue treated as the value of the reversion, an advantage is given to the reversioner, who receives all the increase in the value of the two interests arising from the fact that they are sold jointly instead of separately: *Re Cooper and Allen*, 4 Ch. D. 802, at p. 807.

Method of apportionment.

Trustees may not sell the land without the timber: *Timber. Cockerell v. Cholmeley*, 1 Russ. & My. 418.

The minerals may be reserved or sold separately under the *Minerals. Settled Estates Act*, 1877, s. 19, or the *Settled Land Act*, 1882, s. 17.

On a sale by a mortgagee part of the purchase-money may be allowed to remain on mortgage, provided that the money so remaining unpaid do not exceed the original mortgage debt, and that the mortgagee keeps the sale and mortgage distinct, and submits to be charged with the whole of the purchase-

Mortgage.

money: *Davey v. Durrant*, 1 De G. & J. 535; *Thurlow v. Mackeson*, L. R. 4 Q. B. 97.

Sales after
24 Dec. 1888.

(ii.) *The Law applicable to Sales made on or after the 24th December, 1888.*

The law relating to depreciatory conditions, as above stated, has been altered by the Trustee Act, 1888, s. 3, as follows:—

Trustee Act,
1888, s. 3.

“(1) No sale made by a trustee shall be impeached by any *cestui que trust* upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it shall also appear that the consideration for the sale was thereby rendered inadequate.

“(2) No sale made by a trustee shall, after the execution of the conveyance, be impeached as against the purchaser upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it shall appear that such purchaser was acting in collusion with such trustee at the time when the contract for such sale was made.

“(3) No purchaser upon any sale made by a trustee, shall be at liberty to make any objection against the title upon the ground aforesaid.

“(4) This section shall only apply to sales made after the passing of this Act.”

Sect. 1.

The word “trustee” is explained in sect. 1 of the Act as including “an executor or administrator, and a trustee whose trust arises by construction or implication of law as well as an express trustee.” Sect. 3, therefore, subject to the doubt expressed below as to the meaning of sect. 12, would apply to a mortgagee selling under his power of sale. The words *cestui que trust* are not explained, but probably admit of an interpretation analogous to that placed on the word “trustee,” so that sub-sect. 1, above set out, would apply to a mortgagor attempting to impeach a sale made by his mortgagee.

Sect. 12.

Sect. 12 thus states the application of the Act: “(1) This Act shall apply as well to trusts created by instrument executed before as to trusts created after the passing of this Act. (2) Provided always, that, save as in this Act expressly provided, nothing therein contained shall authorize any trustee to do any-

thing which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument or instruments creating the trust."

One result of the peculiar wording of sect. 12 (1) would seem to be that the Act is not applicable to trusts created before the passing of the Act other than trusts created "by instrument." The case of a mortgagee selling after the Act under a power of sale contained in a mortgage deed executed before the Act might perhaps therefore be considered as outside the Act, since the trust to exercise the power of sale providently is not a trust created by the mortgage deed itself, and might be treated as a constructive trust created by law at the time of the execution of the mortgage deed. But it is submitted that the trust in such a case is not "created" until the mortgagee actually sells, as there is no need for him to be provident in regard to his power of sale until he takes steps to sell. If so, the case of a mortgagee selling after the Act under a power of sale contained in a mortgage deed executed before the 24th December, 1888, is within the Act.

In sub-sect. 3 of sect. 3 the words "upon the ground aforesaid" mean simply upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory; they do not incorporate the exceptions as to collusion and inadequacy of consideration set out in the two previous sub-sections.

Sales made on or after the 24th December, 1888, may, notwithstanding the Act, be impeached by the *cestui que trust* on the ground of depreciatory conditions: (1) as against the purchaser (a) before the execution of the conveyance, by showing that the use of depreciatory conditions has made the property sell for less than its real value, (b) before or after the execution of the conveyance, by showing collusion between the trustee and the purchaser at the time of the contract; and (2) as against the trustee, by showing that the use of depreciatory conditions made the property sell for less than its real value, or by showing fraud or collusion between the trustee and the purchaser at the time of the contract.

Sales after
Act, when
impeachable.

CHAPTER XXXVIII.

PARTICULARS AND CONDITIONS ON A SALE BY THE COURT.

Preparation
of particulars.

ON a sale by, or (more strictly) under the direction of, the Court, the particulars of sale are prepared by the solicitor of the party having the conduct of the sale, and settled at chambers. They must be intituled in the action or matter, and must state that the sale is made with the approbation of the judge under a judgment or order: Dan. Ch. Pr. 1075.

Conditions
prepared by
conveyancing
counsel,

"Before any estate or interest shall be put up for sale under a judgment or order, an abstract of the title shall, unless otherwise ordered, be laid before some conveyancing counsel, approved by the Court or judge, for his opinion thereon, to enable proper directions to be given respecting the conditions of sale and other matters connected with the sale. The conditions of sale shall specify a time for the delivery of the abstract of title to the purchaser or to a solicitor": R. S. C. 1883, Ord. LI. r. 2, and 15 & 16 Vict. c. 86, s. 56. The Court has, under this rule, discretion to direct the sale to be made without laying the abstract before a conveyancing counsel: *Gibson v. Woollard*, 5 De G. M. & G. 835. The smallness of the property involved would be a reason for the Court dispensing with a reference to the conveyancing counsel. See *Chamberlain v. C.*, 1 Sm. & G. App. xxviii. (a petition for the settlement of a sum of 300*l.*). Probably, in the case of small properties, the sale will now be generally made out of Court under Ord. LI. r. 1a.

or not, at
discretion of
Court.

Settled at
chambers.

The particulars and conditions are finally settled at Chambers (Dan. Ch. Pr. p. 1078), and printed. See Ord. LI. r. 5.

Usual
conditions.

There are certain conditions which are generally used in sales by the Court; they are given in App. L., No. 15 to the R. S. C., 1883, and are set out in the Appendix to this book at p. 393.

Vendor's
responsibility.

In the preparation of the conditions of sale the conveyancing

counsel to the Court is the agent of the vendor, and the vendor is responsible for misrepresentations made by him: *Re Banister*, 12 Ch. Div. 131, at p. 141.

At least as much good faith is required as in ordinary sales, *Bona fides*. perhaps more: *Ibid*. In *Else v. Else*, 13 Eq. 196, and *Re Arnold*, 14 Ch. Div. at p. 273, it is said that greater good faith and greater accuracy is necessary in a sale by the Court than in a sale out of Court.

The Court will not attempt to sell property with an absolutely bad title: *Bennett v. Wheeler*, 1 Ir. Eq. R. 18. Absolutely bad title.

Where the conditions precluded the purchaser from inquiring into the prior title, and made the recitals conclusive evidence, the purchaser was discharged from the purchase on its appearing that one of the recitals had been framed so as to conceal a defect in the prior title: *Else v. Else*, 13 Eq. 196. Misleading condition.

A condition for rescission by the vendor may be inserted on a sale by the Court. See, for a form of such condition, *Powell v. Powell*, 19 Eq. 422, at p. 423 (repeated in the Appendix to this book, p. 395). In *Powell v. Powell*, a condition enabling the vendor, with the leave of the judge, to "cancel the contract," was held not to be applicable where the vendor made no application to discharge the purchaser, took no steps to rescind, and insisted on completion. Condition for rescission.

On the sale (in 1843) of a lease for lives, renewable for ever (dated 1794), the Court allowed a condition relieving the vendor of the duty of producing the lessor's title, but would not allow a condition requiring the purchaser to admit the lessor's title, or precluding him from investigating the lessor's title: *Lahey v. Bell*, 6 Ir. Eq. R. 122. Lessor's title.

Where leasehold property is sold in lots the usual course on a sale by the Court is for the purchaser of the largest lot to take an assignment of the whole lease himself, and to make underleases to the purchasers of the other lots. And it is in such cases usual to introduce a stipulation that the purchaser of the largest lot, who will be the lessor with relation to the purchasers of the other lots, shall give the same covenants as the owner of the leasehold property would ordinarily enter into with sub-lessees against all loss which they might sustain by reason of Leaseholds in lots.

the non-payment of rent or non-performance of covenants contained in the original lease: per Kindersley, V.-C., in *Browne v. Paull*, 26 L. T. 232.

Reservations.

On a sale by the Court the following condition was used:—
“The freehold lots — to — are sold subject to the reservations and stipulations mentioned in the particulars so far as the same affect such lots respectively, and the respective conveyances of such lots shall contain proper reservations and provisions, and covenants by the purchasers for the purpose of securing the liabilities and rights under such reservations and stipulations, the form of such reservations, provisions, and covenants in case of dispute to be settled by the judge.” At the instance of the purchaser the judge settled the covenant, adding a proviso that if the purchaser assigned, and the assignee entered into a similar covenant, the purchaser should be free from further liability. It was held on appeal that this proviso must be struck out, the vendor being entitled to an unqualified covenant: *Pollock v. Rabbits*, 21 Ch. Div. 466.

PART III.

CHAPTER XXXIX.

THE MEMORANDUM.

"No action shall be brought whereby to charge any person upon any agreement made upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized": Statute of Frauds (29 Car. 2, c. 3), s. 4 (leaving out immaterial words). Statute of Frauds, sect. 4.

A sale of land by auction is within the Statute of Frauds: Auction. *Buckmaster v. Harrop*, 13 Ves. 456, and reports *passim*.

A sale of the materials of a standing building, to be taken away by the purchaser, is within the statute: *Lavery v. Purssell*, 48 L. T. N. S. 846. Building materials.

The statute does not apply to sales by the Court (*Att.-Gen. v. Sale by Court. Day*, 1 Ves. sen. 218); but applies to sales in bankruptcy: *Ex parte Cutts*, 3 Deac. 242, at p. 267 (1838).

It is not necessary that the person suing for specific performance should have signed the agreement; it is sufficient if the defendant has signed it: *Seton v. Slade*, 7 Ves. 274. Signature by defendant alone.

A signature written with a pencil is sufficient: *Lucas v. James*, 7 Ha. 410, at p. 419. Signature in pencil.

A printed signature is sufficient "if a man be in the habit of printing his name" (per Lord Eldon, in *Saunderson v. Jackson*, 2 B. & P. 238); or if the person whose name is printed fills in the rest of the agreement himself, or otherwise recognizes the name as having been printed by his authority (*Schneider v. Norris*, 2 M. & S. 286); even though the printed name be at the top or otherwise than at the end of the agreement: *Tourret*

v. Cripps, 48 L. J. Ch. 567. But the printing of the auctioneer's name outside the conditions is not a signature: *Dyas v. Stafford*, 9 L. R. Ir. 520.

Stamp.

A stamped signature is sufficient: per Le Blanc, J., in *Schneider v. Norris*, 2 M. & S. 286; and per Bovill, C. J., in *Bennett v. Brumfitt*, L. R. 3 C. P. 28.

Initials.

Signature by initials only is not binding: *Sweet v. Lee*, 3 Man. & G. 452. Dart says (p. 269), signature by initials may be binding; but in *Phillimore v. Barry*, 1 Camp. 513, which is the only case cited there which at all supports that proposition, there was a letter subsequently written and signed in full.

Holograph.

A memorandum of agreement in the writing of the person to be charged, and containing his name as a party to the agreement, is sufficient, although the name is not subscribed (*Bleakley v. Smith*, 11 Sim. 150); and although the name itself is not written but only printed at the head of the paper: *Tourret v. Cripps*, 48 L. J. Ch. 567.

Telegram.

A telegram signed by the telegraph clerk would seem to be sufficient if the vendor has signed the instructions for the message: *Godwin v. Francis*, L. R. 5 C. P. 295. Per Bovill, C. J. (*ibid.* p. 302), the signature by the telegraph clerk, if done with the authority of the vendor, would be enough without the signature of the vendor to the instructions.

**Auctioneer's
signature
as agent for
vendor.**

The auctioneer is by implication an agent lawfully authorized to sign the memorandum on behalf of the vendor; the authority being given by the appointment as auctioneer. See Sug. 147.

After the hammer is down, the authority to sign cannot be revoked by the vendor: per Romilly, M. R., in *Day v. Wells*, 30 Beav. 220.

**As agent for
purchaser.**

The auctioneer is also, after the hammer is down, the agent of the purchaser for signing the memorandum, in virtue of the implied authority given by the act of bidding: *Emmerson v. Heelis*, 2 Taunt. 38: see remarks on that case and on conflicting authorities in *Earl of Glengal v. Barnard*, 1 Keen at p. 788. See too *Kemays v. Proctor*, 3 Ves. & B. 57; 1 J. & W. 350.

The fact of the auctioneer being also the vendor (though only selling as a trustee) makes the Court scrutinize the fact of

signature closely. See *Buckmaster v. Harrop*, 13 Ves. 456. In such a case, and probably in every case, there must be a contemporary signature: *Ibid.* According to *Farebrother v. Simmons*, 5 B. & Ald. 333 (a decision on sect. 17 of the Statute of Frauds), the auctioneer, if he is also the vendor, cannot be the agent of the purchaser for the purpose of signing, because the legislature contemplated as agent a third party and not the party suing. In *Bird v. Boulter*, 1 Nev. & M. 313, at p. 316, Littledale, J., doubts the propriety of this decision, but it was recognized as settled in *Sharman v. Brandt*, L. R. 6 Q. B. 720 (a sale by a broker, not by auction).

But an auctioneer's clerk is a "third party" within the above rule, and signature by him, if he is otherwise duly authorized by the purchaser, will not be bad merely because the auctioneer is the vendor: *Bird v. Boulter*, 1 Nev. & M. 313. Auctioneer's clerk.

The auctioneer's clerk has, in general, no authority to sign on behalf of the vendor (*Coles v. Trecothick*, 9 Ves. 234, at pp. 243 and 251), but special circumstances may be proved showing that the vendor assented to the signature by the clerk, as where the auctioneer told the vendor that he was in the habit of allowing his clerks to sign contracts: *Ibid.* Probably at a sale by auction, the vendor standing by whilst the clerk signed, would by his silence confer authority on the clerk to sign. Clerk signing on behalf of vendor.

A receipt signed three days after the auction by the auctioneer's clerk on behalf of the auctioneer, acknowledging that he had "received from Mr. Dyas 30*l.* sterling, which, with 20*l.* paid 10th August, makes 50*l.* deposit on his purchase, lot 4, Mr. John Stafford's property," and a letter by the vendor's solicitor, headed "Stafford to Dyas," and referring to the purchase, were held insufficient to bind the vendor: *Dyas v. Stafford*, 9 L. R. Ir. 520.

The auctioneer's clerk has not by general custom any authority to sign on behalf of the purchaser: *Peirce v. Corf*, L. R. 9 Q. B. 210, 215 (on sect. 17). But if the purchaser nods or otherwise signifies his assent, this will be sufficient authority: *Bird v. Boulter*, 1 Nev. & M. 313. Signature by the auctioneer's clerk, otherwise than in the purchaser's presence, would probably Clerk signing on purchaser's behalf.

be insufficient unless express authority had been given. See *Henderson v. Barnewall*, 1 Y. & J. 387 (not sale by auction).

Essential matters.

The essential matters of the agreement must be stated in writing in order to satisfy the Statute of Frauds. The essential matters are (1) the names of the parties; (2) the property sold; (3) reservations (if any) over the property sold, the price, and the conditions of sale (if any).

(1) *Names of the Parties.*

Parties.

Both the vendor and the purchaser must be named or sufficiently described in the memorandum itself, or in the particulars or conditions to which the memorandum is annexed: *Williams v. Lake*, 2 E. & E. 349.

And they must be named as vendor and purchaser respectively. Thus, where the person who signed the memorandum was the vendor, but was described as "solicitor for the vendor," this was held an insufficient mention of his name: *Jarrett v. Hunter*, 34 Ch. D. 182.

A receipt signed by the vendor, and in the following form, "Received from E. T. Hooley the sum of one hundred, being deposit on all my property, Market Place, sold for 2,000*l.*, complete Christmas, 1887," was held to be sufficient, although it did not state expressly that E. T. Hooley was the purchaser: *Smith v. Brentnell*, W. N. 1888, p. 69.

Sufficient description.

It is a sufficient description if the parties can be identified without the aid of evidence of the sort called by Sir J. Wigram "evidence to prove intention as an independent fact": per Lord Blackburn in *Rossiter v. Miller*, 3 App. Ca. 1124, at p. 1153, referring to Wigram on Extrinsic Evidence, Intr. Obs. p. 10.

"Vendor."

The words "confirmed on behalf of the vendor," signed by the auctioneer, do not contain a sufficient description: *Potter v. Duffield*, 18 Eq. 4.

"Client."

The description of the vendor as the "client" or "friend" of the auctioneer would be insufficient: per Kay, J., in *Jarrett v. Hunter*, 34 Ch. D. 182.

The following descriptions and statements were held to be sufficient:—

"Executors." A statement in the particulars that the sale was made "by

direction of the executors," although the executors had not yet proved the will: *Hood v. Lord Barrington*, 6 Eq. 218.

A statement in the conditions that "the vendor is a trustee "Trustee." selling under a trust for sale": *Catling v. King*, 5 Ch. Div. 660.

A statement in the conditions that the vendor was "the legal "Personal personal representative of D.," although as a fact he was not at representative." the time of the sale D.'s legal personal representative, but was the only person entitled to be so: *Towle v. Topham*, 37 L. T. N. S. 308.

Where the auctioneer signed merely on behalf of "the vendor," "Proprietor." but the particulars which were embodied in the contract stated that the property was put up for sale by "the proprietor," this was held to be sufficient: *Salé v. Lambert*, 18 Eq. 1.

Where the auctioneer merely signed as "agent for the "Company." vendors," but the conditions embodied in the contract showed that the vendors were in possession, and that they were a company who had carried on operations on the land, and that "the interest of the company" would be assigned to the purchaser, it was held that the vendors were sufficiently described: *Commins v. Scott*, 20 Eq. 11.

On the other hand, "the Court ought to be careful not to manufacture descriptions, or be astute to discover descriptions which a jury could not identify": per Jessel, M. R., *ibid*.

The contents of a conveyance referred to in the conditions cannot be imported into the contract for the purpose of showing who is the vendor: per Kay, J., in *Jarrett v. Hunter*, 34 Ch. D. 182. Reference to deed.

(2) *The Property Sold.*

In a sale by auction the property is usually fully described Property. in the particulars. It is not necessary, therefore, to state here what is a sufficient description to satisfy the statute, the cases of insufficient description being all cases of private sales, and generally by letter or other informal agreement. In a sale by auction the point which has usually to be considered is not whether the description of the property was sufficient, but whether the memorandum sufficiently refers to or incorporates the particulars of sale (as to which see below, p. 381).

It is conceivable, however, that even in a sale by auction the description contained in the particulars might be so inaccurate as to be utterly inapplicable to the property sold, in which case it might perhaps be held that the property sold was not described so as to satisfy the Statute of Frauds. In such a case the question whether the statute was satisfied would become important if the purchaser knew what was being sold, since the purchaser's knowledge would, apart from the Statute of Frauds, preclude him from objecting to the misdescription. "If the subject-matter is wrongly described, but another subject-matter is clearly in the minds of the parties, the misdescription will not preclude the vendor from his right to have specific performance": per Fry, J., in *Flood v. Pritchard*, 40 L. T. N. S. 873. If the statute, however, is not satisfied by the written contract, the purchaser's knowledge will not supply the defect. See below.

(3) *Other Essentials.*

Other
essentials.

All essential matters must be stated in the contract.

Reservations.

Any reservation must be clearly stated. A reservation of the right to "search for and work mines or minerals" is not too indefinite: *Parker v. Taswell*, 2 De G. & J. 559.

Conditions of
sale.

The conditions of sale are essential matters: see further, p. 381, below.

Price.

The price must be stated. A receipt for the deposit is not sufficient, unless the receipt states the amount of the purchase-money, or the proportion of the deposit to the whole purchase-money: *Blagden v. Bradbear*, 12 Ves. 466. But a receipt for the deposit indorsed on conditions of sale, stating that a deposit of 10 per cent. should be paid, would probably be sufficient.

"Fair
valuation."

A sale "at a fair valuation" is an insufficient fixing of the price. See conditions for selling fixtures or timber at a valuation, p. 185. A sale of the whole property at a valuation, and other instances of the price being uncertain, belong to the law relating to private sales.

Purchaser's knowledge of fact omitted in the Written Contract.

Purchaser's
knowledge.

A contract which cannot be enforced under the Statute of Frauds because of an omission to state an essential matter, is

not rendered capable of being enforced against the purchaser by the fact that the purchaser himself knew the matter at the time he entered into the contract. Thus, the omission to state who was the vendor was not cured by the fact that the purchaser knew it at the time : *Jarrett v. Hunter*, 34 Ch. D. 182.

Stamping.

The memorandum of agreement must be stamped with a Stamp. sixpenny stamp, unless the purchase-money is under 5*l.* : Stamp Act, 1870. If one purchaser buys several lots there must be a separate stamp for each lot exceeding 5*l.* : *James v. Shore*, 1 Stark. 426.

Incorporation of the Memorandum with the Conditions.

The memorandum must be either annexed to the conditions of sale, or, if on a separate paper, must refer to them ; the conditions of sale being an essential part of the contract.

Memorandum
must in-
corporate
conditions.

An entry by the auctioneer in his sale book of the names of the vendor and purchaser, the subject-matter of the contract, and the amount of the purchase-money, omitting all reference to the conditions of sale, is not a sufficient memorandum within sect. 4, because it does not contain all the essential terms of the contract : *Rishton v. Whatmore*, 8 Ch. D. 467 (a decision of Hall, V.-C.).

So, in cases under sect. 17, an entry by the auctioneer on the catalogue of sale of the purchaser's name, the quantity of the goods and the price, is not a sufficient memorandum where the sale is made subject to conditions of sale which are neither annexed nor referred to in the catalogue or the auctioneer's entry thereon : *Hinde v. Whitehouse* (dictum), 7 East, 558 ; *Kemworthy v. Schofield* (decision), 2 B. & C. 945.

Some remarks of Jessel, M. R., and Baggallay, L. J., in *Shardlow v. Cotterell*, 20 Ch. Div. 90, seem to favour the view that it is not necessary that the conditions should be referred to in the memorandum. They considered that a receipt signed by the auctioneer for the deposit, and mentioning the vendor's name and that of the purchaser, and referring to the property sold as "property purchased at the Sun Inn, Pinxton," on a

certain date, was a sufficient memorandum in itself, without having recourse to the conditions of sale which were not annexed or referred to in the receipt. But these remarks were only *dicta*, as the Court held that the receipt sufficiently referred to the conditions of sale to incorporate them; the case of *Rishton v. Whatmore*, 8 Ch. D. 467, not being mentioned.

There certainly seems no reason for holding that the statute requires all the terms of the contract to be stated in the "memorandum or note"; and, apart from decision, it would have seemed that a memorandum containing the names of the vendor and purchaser, a description of the property and the price, satisfied the statute.

The fraud of the party seeking to enforce a memorandum which does not contain all the essential terms of the contract, is sufficiently baffled by the admission of parol evidence on behalf of the defendant to show that the memorandum did not contain all the terms of the agreement. See Chap. XXI., p. 161.

Two
documents
connected.

But the Courts have been astute to find a connection between two documents embodying the terms of one contract, at any rate in the case of the sale of land.

Thus, a receipt signed by the vendor's agent, "received of L. the sum of 31*l.* as a deposit on the purchase of three plots of land at Hammersmith," was held to refer to an agreement signed by the purchaser, and containing a stipulation fixing the date for completion: *Long v. Millar*, 4 C. P. Div. 450, Bramwell, L. J., thinking that "purchase" meant agreement to purchase, and that the agreement referred to could be identified as the written agreement signed by the purchaser.

Conditions of sale headed, "Property sale at Sun Inn, Pinxton, March 29, 1880," but containing no description of the property, with a memorandum at the foot signed by the auctioneer, "The property duly sold to S. and deposit paid at close of sale," together with a separate but contemporary receipt, dated and signed by the auctioneer, for a sum "received of Mr. S., as deposit on property purchased at 420*l.*, Sun Inn, Pinxton, on above date, Mr. C., owner," were held to be connected together by virtue of the word "purchased" in the receipt: *Shardlow v. Cotterell*, 20 Ch. Div. 90.

A stricter rule of construction has obtained in the case of sales Under
sect. 17.
within sect. 17.

Where the auctioneer's clerk, under a heading in his "Sales ledger," "Select sales by auction, 28 March, 1872," made and signed the following entry, "Owner, Peirce; lot 49; gray mare, age 6; warranty as to soundness; ——— warranty as to harness; ride and drive; reserve, C. E.; purchaser, T. Maguire, 33/," (and other matters), the entry was held to be an insufficient memorandum, because it contained no reference to the catalogue or the conditions of sale annexed to the catalogue: *Peirce v. Corf*, L. R. 9 Q. B. 210. It might have been thought that the number of the lot was a sufficient reference, not to mention the word "sale," which, on the principle of the two preceding cases, would itself have shown a reference to the conditions of sale on the catalogue.

Part Performance.

Notwithstanding sect. 4 of the Statute of Frauds, the Court Part per-
formance. enforces contracts relating to land which have not been reduced to writing or properly signed, if there has been what is called "part performance" of the contract.

"The Court is in the daily habit of relieving" against the statute "where the party seeking relief has been put into a situation which makes it against conscience in the other party to insist on the want of writing so signed as a bar to his relief. . . . It was against conscience to suffer the party who had entered and expended his money on the faith of a parol agreement to be treated as a trespasser, and the other party to enjoy the advantage of the money he had laid out; at law fraud destroys rights": per Lord Redesdale in *Bond v. Hopkins*, 1 Sch. & Lef. at p. 433.

In order that an act may have the effect of part performance, Definition. it must be unequivocally referable to the agreement, and the position of the parties must be unequivocally different from what it would have been had there been no agreement.

"Nothing is considered as a part performance which does not put the party into a situation, that is a fraud upon him unless the agreement is performed; for instance, if upon a parol agree-

ment a man is admitted into possession, he is made a trespasser, and is liable to answer as a trespasser if there be no agreement. This is put strongly in the case of *Foxcraft v. Lister* (2 Vern. 456); there the party was let into possession on a parol agreement, and it was said that he ought not to be liable as a wrongdoer, and to account for the rents and profits, and why? because he entered in pursuance of an agreement. Then, for the purpose of defending himself against a charge which might otherwise be made against him, such evidence was admissible, and if it was admissible for such purpose, there is no reason why it should not be admissible throughout": per Lord Redesdale, in *Clinan v. Cooke*, 1 Sch. & Lef. at p. 41.

"In order to amount to part performance an act must be unequivocally referable to the agreement; and the ground on which courts of equity have allowed such acts to exclude the application of the statute is fraud": per Plumer, M. R., in *Morphett v. Jones*, 1 Swanst. at p. 181.

"It is in general of the essence of such an act that the Court shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract. . . . An act which though in truth done in pursuance of a contract, admits of explanation without supposing a contract is not, in general, admitted to constitute an act of part performance, taking the case out of the Statute of Frauds": per Wigram, V.-C., in *Dale v. Hamilton*, 5 Hare, 369, at p. 381.

Ancillary act. An act "merely introductory or ancillary to the agreement, though attended with expense," is not sufficient: per Lord Thurlow, in *Whitbread v. Brockhurst*, 1 Bro. C. C. 404, at p. 412.

Examples of acts of part performance. The admission of the purchaser to possession of the property agreed to be sold is usually a sufficient act to constitute part performance: *Morphett v. Jones*, 1 Swanst. 181. But it is possible for possession to be wrongfully taken (*Cole v. White* mentioned in argument of *Whitbread v. Brockhurst*, 1 Bro. C. C. at p. 409), in which case the act would be insufficient. The mere fact that the vendor has not given his express assent to the purchaser's taking possession does not make the act insufficient,

especially if the vendor has acquiesced therein and allowed the purchaser to lay out money on the land: *Gregory v. Mighell*, 18 Ves. 328, at p. 333.

Expenditure by the purchaser on the land upon the faith of the agreement is sufficient, at any rate, if known to and acquiesced in by the vendor: *Gregory v. Mighell*, 18 Ves. 328. Expenditure.

If there has been a very long acquiescence, slight acts of part-performance are sufficient: *Blachford v. Kirkpatrick*, 6 Beav. 232, at p. 236. Long acquiescence.

The following acts are insufficient to constitute part-performance:— Insufficient acts:

Payment of part of the purchase-money (*Clinan v. Cooke*, 1 Sch. & Lef. 22, at p. 40): and this, for two reasons, first that in another section (sect. 17) the Statute expressly enacts that part-payment of purchase-money is sufficient to support a contract for the sale of goods, and, secondly, that money which has been paid can be recovered. Payment.

Payment of the whole of the purchase-money: *Hughes v. Morris*, D. M. & G. 349, at p. 356.

Payment of the auction duty: *Buckmaster v. Harrop*, 7 Ves. 341.

Giving instructions to a solicitor to prepare the conveyance: *Clerk v. Wright*, 1 Atk. 12; *Cooke v. Tombs*, 2 Anst. 420. Drafting conveyance.

Altering a draft conveyance, and returning it for engrossment: *Hawkins v. Holmes*, 1 P. Wms. 770 (where, however, the doctrine of part-performance was not adverted to).

Executing and registering the conveyance will not entitle the vendor to enforce the contract: *Ibid.* Executing conveyance.

Going repeatedly to view the property: *Clerk v. Wright*, 1 Atk. 12. Other acts.

Employing surveyors to value the timber: *Whitbread v. Brockhurst*, 1 Bro. C. C. 403, at p. 412.

Or appointing a person to measure the land (*Pembroke v. Thorpe*, 3 Swanst. 437, n.); even if the measurement is actually made: *Ibid.* p. 442, n.

Where there has been an act of part-performance, the contract may be enforced by either party. See *Kine v. Balfe*, 2 B. & B. 343, where on an agreement for a lease not signed by the lessee

the lessee took possession, and the *lessor* was held able to enforce the agreement.

Lots.

On a sale in lots an act of part-performance in relation to one lot will not be sufficient to take the other lots out of the statute: *Buckmaster v. Harrop*, 13 Ves. 456, at p. 474. Probably, however, if the purchaser in defence to the vendor's action for the specific performance of the agreement relating to the one lot, could show that the other lots were necessary to the enjoyment of the lot in question, he would not be bound to complete the sale of the single lot unless all the lots were conveyed. See above, p. 111.

APPENDIX I.

HINTS ON THE PREPARATION OF PARTICULARS AND CONDITIONS OF SALE.

Both the particulars and the conditions should be printed, and should be circulated at or before the sale. The practice of merely reading the conditions aloud at the sale is strongly condemned in *Torrance v. Bolton*, 14 Eq. 130. If the conditions are merely read aloud by the auctioneer, and not incorporated in the agreement signed by the purchaser, the vendor will be unable to enforce specific performance of the contract subject to the conditions, or, if the purchaser brings an action for rescission, will have to prove that the purchaser heard the conditions read. Printing.

If any alteration or addition is made in or to the particulars or conditions, the auctioneer should not be satisfied with merely reading the altered particulars or conditions, but should pointedly call attention to the fact that they have been altered and in what way. (See *Manser v. Back*, 6 Ha. 443.) Care should be taken to insert the alteration or addition in the copy of the particulars to be signed by the purchaser, otherwise the vendor could not obtain specific performance of the contract as varied. Alteration.

In preparing the particulars, care must be taken to avoid incorrect statements of acreage, rental, &c. If the property is to be sold subject to mortgages, the mortgages must be mentioned in the particulars; it is not enough to mention them in the conditions. Acreage.
Mortgages.

In selling copyholds it is not necessary to mention the fines, but if they are mentioned care must be taken not to misrepresent their amount. Copyholds.

In selling leaseholds, or freeholds subject to a lease, the vendor need not mention any of the covenants, even if they are unusual, but a copy of the lease should be ready for the purchaser's inspection at or before the sale, and the conditions should announce the fact and refer the purchaser to the copy lease. If the lease is read aloud at the sale this would be sufficient, unless the particulars or conditions contained a misstatement or a partial and misleading statement of the contents. A very common mistake is to describe the lease as containing "the usual covenants." If any of the covenants are unusual this is a misdescription, and in any case, even if all the covenants are usual, the statement is unnecessary. Leases.

In selling an underlease, the word underlease, and not lease, should be used. Underlease.

In describing reversions, especially contingent reversions, great care must be taken to avoid misdescriptions. It is often safer in Reversions.

- such cases to quote verbatim the clause in the deed or will creating the reversion.
- "Building land."** If property is sold as "building land," rights of way should be mentioned; it is, perhaps, safer to mention them in any case. All latent defects must be mentioned.
- Plan.** If a sale plan is used, the rights of way to which the property is subject should be marked.

Conditions of Sale.

- Common form conditions.** The plan adopted in most provincial towns of selling under certain general conditions, settled by the Incorporated Law Society of the town, and well known to all lawyers practising in the town or its vicinity, has much to recommend it. The purchaser or his solicitor can distinguish at a glance the special conditions which it is important to read in order to know what sort of title the vendor will give. But care should be taken on a sale by trustees or mortgagees to strike out any of the general conditions which are unnecessary, as otherwise the sale may, perhaps, be upset on the ground of "depreciatory conditions." An example of a condition which, in most cases, would be depreciatory, is the following, which appeared in the printed conditions in use in Birmingham (in 1881):—
- "Every deed and document shall, in all cases where evidence is not in the vendor's possession, be conclusive of everything recited, stated, noticed, assumed, or implied therein."
- Depreciatory conditions.** However, the risk of a sale being upset on the ground of depreciatory conditions is now extremely slight, as under the Trustee Act, 1888, the purchaser cannot object to the title on that ground, and the *cestui que trust's* remedies against the trustee and purchaser are materially reduced. (See above, p. 370.)
- Statutory conditions.** The statutory conditions of sale may be relied on, subject to the following remarks:—
- The condition as to recitals twenty years old may perhaps still be usefully employed, as the Act does not make such recitals "conclusive" evidence, and therefore does not preclude the purchaser from objecting that he has discovered *aliunde* that the recitals are incorrect.
- It may also be advisable still to use the old condition as to the production of the last receipt for rent, which is not by the Act made evidence of *waiver*. If the rent is a peppercorn the statutory condition does not apply at all.
- The statutory conditions as to the lessor's title have no application to leases for lives.
- Reserve.** The conditions must state (if it is the fact) that the vendor reserves the right of bidding, or that there is a reserved price.
- Fixtures and timber.** Special mention must be made of fixtures and timber if they are to be paid for extra. If they are to be taken at a valuation, the conditions should provide for the appointment of valuers or a valuer, and for the case of their or his refusal to act; if two valuers are to be appointed, the conditions should provide for a difference between them or make the valuation an arbitration under the Common Law Procedure Act, 1852, s. 11.

Trustees should not attempt to sell the timber separately by valuation.

Growing crops also must be separately mentioned if they will not be ripe before completion, and the vendor wishes to be paid separately for them; and a special condition must be employed if the vendor wishes to have any allowance made to him for seed, manure, &c.

Growing crops.

Manure.

On a sale of leaseholds the particulars or conditions should specify that only tenant's fixtures will be sold.

Tenant's fixtures.

The conditions should not state that the abstract shall be delivered on such and such a day, because if the vendor fails to deliver the abstract on the day fixed, he will be hampered in enforcing his remedies against the purchaser for delay. But in sales under the Court a time has to be fixed for the delivery of the abstract: see *Precedents*, p. 394.

Abstract.

It is better to state the commencement of the title, even if a full forty years' title is to be given. It is also advisable to describe the document forming the root of title; for if it is a purchase deed or mortgage, the title looks better than if undescribed, and if the root of title be not a purchase deed or mortgage, or other good root of title, the vendor ought to let the purchaser know that that is the case.

Commencement of title.

Where the title commences with a will the vendor should stipulate that the purchaser shall assume that the testator died seised, and in case of wills before the Wills Act that the testator was seised at the time of his will and thenceforth till his death.

Will.

Where the title depends on an order of sale made by the Court, it may sometimes (*e. g.*, where the interests of infants were affected by the order) be advisable to preclude the purchaser from objecting that the Court had no jurisdiction.

Sale by Court.

On a sale of leaseholds bequeathed to trustees who are not also executors, the purchaser should be asked to assume that the testator's executors had assented to the bequest.

Bequest of leaseholds.

The purchaser should never be required to assume things which the vendor knows to be false. If the vendor knows of any actual defect in title, it is better to mention it, and say no objection shall be taken in respect thereof. If there is merely an absence of evidence of title, the vendor may in that case stipulate that the purchaser shall make the necessary assumption of facts.

"Assume."

If the title is very complicated, it may be desirable to offer the purchaser the opportunity of inspecting the abstract before the sale. But as a rule it will be found sufficient to reduce the length of title.

Title very complicated.

On the sale of a large estate which has been in the possession of one family for many years, it will generally be advisable to preclude the purchaser from requiring any other evidence of identity than that afforded by a statutory declaration by the steward (or some other person acquainted with the property) that the property has been held for a specified number of years consistently with the title shown on the abstract.

Identity.

The condition for compensation should be limited to defects discovered before conveyance, otherwise the vendor may find himself called upon to pay compensation for some misdescription after he has conveyed the property and received, and perhaps spent, the purchase-money.

Compensation.

Covenants in lease.

On the sale of leaseholds, it is usual (but not necessary) expressly to stipulate that the purchaser shall covenant to pay and perform and shall indemnify the vendor against the rent and covenants in the lease.

Apportionment of rent.

Where the vendor sells *part* of leasehold property or of freeholds subject to a rentcharge or of a reversion expectant on a lease, he must provide for the apportionment of the rent, and also, in the first and second cases, must arrange whether he or the purchaser shall bear the burden of the whole rent or rentcharge as between himself and the reversioner or owner of the rentcharge.

Upon a sale in lots, if all the land is held under one lease or is subject to one lease or to a rentcharge, the vendor must provide for apportionment of the rent. In the case of the sale of leaseholds, if the lessor withholds his consent to the apportionment, the vendor must either (1) assign the lease to the purchaser of the largest lot in value and stipulate that such purchaser shall grant underleases for the whole term less, say, one day, to the other purchasers covenanting to pay the whole rent and indemnify them against the breach of the covenants in the superior lease, they on their part covenanting to pay him the apportioned rent in respect of their lots and to observe the covenants in the superior lease so far as their lots are concerned; or (2) agree to grant underleases to all the purchasers but one, subject to the apportioned rents, and then to assign the original lease to the other purchaser. See Condition 13, p. 397 below. The whole arrangement should be clearly stated in the conditions.

In the case of freeholds subject to a rentcharge, which the vendor is unable or unwilling to redeem under the Conveyancing Act, 1881, sect. 45, or to have apportioned under 17 & 18 Vict. c. 97, ss. 10—14, each lot will, as against the owner of the rentcharge, remain subject to the whole burden. But the particulars should provide for the apportionment of the rent as between the different purchasers, and for giving them cross powers of distress or entry. If the rentcharge is small it may all be charged on one lot, the purchaser of which will have to indemnify the purchasers of the other lots against the payment of the rentcharge either by his covenant with each purchaser, or by his covenant with trustees and grant to them of a rentcharge of like amount with powers of distress and entry.

“Building estate.”

In selling land in lots as a building estate the vendor must be careful not to bind himself to make new roads or widen old ones unless this is his intention. The mere delineation of intended roads on a plan is not an undertaking by the vendor to make such roads, and in the absence of such an undertaking the purchaser will only be entitled to a road leading to the nearest highway. If the roads and sewers are to be made at the expense of the purchasers, the best plan is for the vendor to make them himself and provide that the purchasers shall bear the expenses in the proportion of the value or frontage of their lots. The vendor should reserve the right of modification of the roads in case some lots are not sold.

APPENDIX II.

PRECEDENTS.

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I.—USUAL CONDITIONS OF SALE.

[NOTE.—Conditions of sale may be conveniently arranged in the following order, being the order of time;

- A. Matters relating to the auction, viz., the reserve price and manner of bidding, the payment of the deposit, and signing of the agreement.
- B. Special conditions as to the price, i.e., the separate payment for timber, fixtures, crops, &c., at a valuation.
- C. The abstract; defects in title or evidence of title (e.g., identity), requisitions on title, compensation for misdescription, rescission by the vendor if unable to answer the requisitions.
- D. The form of the conveyance.
- E. Completion, viz., interest on purchase-money, possession, outgoing.
- F. Title deeds.
- G. Damages in case of purchaser's default.]

1. The sale is [Each lot is sold] subject to a reserve price, and Reserve. the vendor reserves the right to bid up to such reserve price by

himself or his agent [and also the right to consolidate two or more lots into one]. If any dispute arise as to any bidding, the auctioneer may either decide the dispute or put up the property [lot] again at the last undisputed bidding. No person shall advance less than £ at a bidding, or retract a bidding.

Deposit. 2. The [Each] purchaser shall immediately after the sale pay to the solicitors of the vendor, as agents for the vendor, a deposit of 10l. per cent. on the amount of his purchase-money, and sign the annexed memorandum of agreement.

[*Here insert conditions as to purchase of timber, fixtures, &c., at a valuation (see p. 395), and special conditions as to title.*]

Identity. 3. No other evidence shall be required of the identity of the property [any lots] described in the particulars with the property to which title is shown by the abstract, besides such evidence (if any) as may be gathered from the descriptions in the documents abstracted [but the purchaser shall, if he so require, be furnished at his own expense with a statutory declaration by that the property has for the last years been held and enjoyed in accordance with the title shown by the abstract].

Easements. 4. The property [Each lot] is sold subject to all easements, if any, affecting the same.

Requisitions. 5. The [Each] purchaser shall, within fourteen days after the delivery of the [his] abstract, send to Messrs. , the vendor's solicitors, at their office, No. , a statement in writing of his objections and requisitions (if any) in respect of the abstract or the title or evidence of title, or any matter appearing in the particulars or conditions, and subject thereto he shall be deemed to have accepted the title and to have waived all objections and requisitions not appearing in such statement, and he shall reply in writing to any answer to his objections or requisitions within seven days after the delivery of such answer, and in the absence of such reply shall be deemed to have accepted the answer as satisfactory; and in respect to all matters mentioned in this condition time shall be of the essence of the contract.

Compensation. 6. The acreage, dimensions, measurements, and quantities [of each lot] shall be deemed correct, and if incorrect shall not annul the sale or be the subject of compensation. Any misdescription, error, or omission as to other matters shall not annul the sale, but if pointed out before completion shall, subject to the vendor's right to rescind under condition 7, entitle the vendor or purchaser, as the case may be, to compensation, the amount thereof in cases of dispute to be determined by two arbitrators or their umpire, to be appointed in the manner and with the powers provided by the Common Law Procedure Act, 1854. [*Or, If any misdescription, error, or omission shall be found in the particulars or conditions, the purchaser shall not be entitled to any compensation in respect thereof.*]

Rescission by vendor. 7. If the [any] purchaser makes any objection, requisition, or claim which the vendor is unable or unwilling to remove or comply with, and shall not waive the same in writing within seven days after being required so to do, the vendor may, notwithstanding any intermediate negotiation or litigation, rescind the contract for sale, and the purchaser shall thereupon return all abstracts and papers delivered to him by the vendor, and shall be entitled to a return of

his deposit. In case of rescission, whether under this condition, or otherwise by the vendor, or by the purchaser, or by any Court or judge, the purchaser shall not be entitled to any interest, damages, or compensation.

8. The conveyance to the [each] purchaser shall be prepared by him at his own expense, and the draft thereof shall be delivered at the office of the vendor's solicitors eight days, and the engrossment two days, before the day fixed for the completion of the sale. [Here add any special conditions as to the form of the conveyance (see p. 396.)] Conveyance.

9. The sale shall be completed, and the remainder of the purchase-money [for each lot and the amount of valuation for the timber and fixtures] paid on the day of , at the office of the vendor's solicitors. If from any cause whatever other than the wilful default of the vendor, the [any] purchase shall not be completed on the day fixed, the purchaser shall pay interest at the rate of 5l. per cent. per annum from that day to the day of actual payment on so much of the purchase-money [and amount of valuation] as for the time being shall remain unpaid, and shall have no claim to compensation in respect of the delay in completion. The [Each] purchaser, after payment of the purchase-money [and valuation], shall be entitled to possession or receipt of rents and profits and be liable for outgoings as from the day fixed for completion, and the rents, profits, and outgoings shall (if necessary) be apportioned. [Note in the case of reversions, &c., this condition will require modification (see p. 398.)] Completion.

[Here insert conditions as to title deeds (see p. 396).] 10. If the [any] purchaser shall fail to comply with these conditions his deposit shall be forfeited to the vendor, and the vendor shall be at liberty, without tendering a conveyance to the purchaser, to re-sell the property [the lot in respect whereof the default occurs] either by auction or by private contract, and at such time and in such manner and with such conditions as the vendor may think proper; and any deficiency in price at such re-sale, and all expenses of the re-sale, and of any abortive attempt to re-sell, shall be recoverable by the vendor from the defaulter at this sale as liquidated damages. Forfeiture of deposit.
Re-sale.
Damages.

Memorandum.

Be it remembered that of has this day of purchased from of the property [lot] described in the annexed particulars of sale for £ , and has paid £ into the hands of as a deposit, and agrees to pay the balance of the purchase-money [and also the amount of valuation] and complete the purchase according to the annexed conditions of sale. Memo-
randum.

Purchase-money£ : :

Deposit£ : :

Balance£ : :

Abstract of title to be sent to .

II.—CONDITIONS OF SALE ON A SALE BY THE COURT.

1. No person is to advance less than £ at each bidding. Bidding.
2. The sale is subject to a reserved bidding for each lot which has been fixed by the judge to whom this cause is assigned. Reserve.

- Signature.** 3. Each purchaser is at the time of sale to subscribe his name and address to his bidding, and the abstract of title, and all written notices and communications and summonses are to be deemed duly delivered to and served upon the purchaser by being left for him at such address, unless or until he is represented by a solicitor.
- Deposit.** 4. Each purchaser is at the time of sale to pay a deposit of £ per cent. on the amount of his purchase-money to , the person appointed by the said judge to receive the same.
- Certificate.** 5. The chief clerk of the said judge will after the sale proceed to certify the result, and the day of at of the clock in the noon is appointed as the time at which the purchasers may, if they think fit, attend by their solicitors at the chambers of the said judge at the Royal Courts of Justice, London, to settle such certificate. The certificate will then be settled, and will in due course be signed and filed, and become binding without further notice or expense to the purchasers.
- Abstract.** 6. The vendor is within [] days after such certificate has become binding to deliver to each purchaser, or his solicitor, an abstract of the title to the lots purchased by him, subject to the stipulations contained in these conditions. And each purchaser is, within four days after the actual delivery of the abstract, to deliver at the office of , solicitor, at , in the county of , a statement in writing of his objections and requisitions (if any) to or on the title as deduced by such abstract; and upon the expiration of such last-mentioned time,—and in this respect time is to be deemed of the essence of the contract,—the title is to be considered as approved of and accepted by such purchaser, subject only to such objections and requisitions, if any.
- Timber.** 7. Each purchaser is, in addition to the amount of his bidding at the sale, to pay the value of all timber and timber-like trees, tellers, and pollards, if any, on the lot purchased by him, down to 1s. per stick, inclusive, the amount thereof to be ascertained by a valuation to be made in manner following; that is to say, each party (vendor and purchaser), or their respective solicitors, is within days after the chief clerk's certificate has become binding to appoint by writing one valuer, and give notice in writing to the other party of such appointment, and the valuers so appointed are to make such valuation, but before they commence their duty they are to appoint an umpire by writing, and the decision of such valuers if they agree, or of such umpire if they disagree, is to be final; and in case the purchaser shall neglect or refuse to appoint a valuer, and give notice thereof in the manner and within the time above specified, the valuation is to be made by the valuer appointed by the vendor alone, and his valuation is to be final.
- Completion.** 8. [*To be altered if the 4th or 7th condition not inserted.*] Each purchaser is under an order for that purpose to be obtained by him, or in case of his neglect by the vendor at the cost of the purchaser, upon application at the chambers of the said judge, to pay the amount of his purchase-money (*after deducting the amount paid as a deposit*), together with the amount of the valuation under the seventh condition, if any, into Court to the credit of this cause , on or before the said day of , and if the same is not so paid, then the purchaser is to pay interest on his purchase-money, including the amount of such valuation, at the rate of £ per

cent. per annum from the day of to the day on which the same is actually paid. Upon payment of the purchase-money in manner aforesaid, the purchaser is to be entitled to possession, or to the rents and profits, as from the day of , down to which time all outgoings are to be paid by the vendor. [*This must be in accordance with the order directing the sale.*]

9. If any error or mis-statement shall appear to have been made in the above particulars, such error or mis-statement is not to annul the sale or entitle the purchaser to be discharged from his purchase, but a compensation is to be made to or by the purchaser, as the case may be, and the amount of such compensation is to be settled by the said judge at chambers. Compensation.

[*Add to these such conditions respecting the title and title deeds as the conveyancing counsel shall advise to be necessary or proper.*]

Lastly. If any purchaser shall not pay his purchase-money at the time above specified, or at any other time which may be named in any order for that purpose, and in all other respects perform these conditions, an order may be made by the said judge upon application at his chambers for the re-sale of the lot purchased by such purchaser, and for payment by such purchaser of the deficiency, if any, in the price which may be obtained upon such re-sale and of all costs and expenses occasioned by such default. Re-sale.

The following conditions may be added:—

If any purchaser shall make any objection or requisition which the vendor shall be unable or unwilling for any reasonable cause to comply with, the vendor shall be at liberty, with the leave of the judge, and notwithstanding any intermediate negotiation or attempt to remove or comply with such objection or requisition, to rescind the contract upon such terms as the judge may approve, and thereupon the purchaser whose contract is so rescinded shall be entitled to have his deposit returned without interest or costs, and shall forthwith return all abstracts and papers in his possession belonging to the vendors. Rescission by vendor.

All facts certified by the chief clerk, or stated in any judgment or order in any action in the Chancery Division relating to the testator's estate, are to be deemed to be sufficiently proved without further evidence. Evidence.

III.—SPECIAL CONDITIONS.

1. *Timber, Fixtures, &c.*

1. All timber and other trees, pollards, tellers, saplings, and underwood [*or the fixtures, or in case of leaseholds, the tenant's fixtures, or the growing crops, or the stock in trade on the premises*] shall be paid for by the purchaser at a valuation to be made by two arbitrators, one to be appointed by each party, or the umpire to be appointed by the arbitrators, the appointments to be made in the manner directed, and the parties hereto, arbitrators, and umpire to have the powers conferred by the Common Law Procedure Act, 1854. Timber and fixtures.

2. Identity.

Special condition as to identity of copyholds.

2. No other evidence shall be required of the identity of any lot with the property to which title is shown by the abstract, besides such evidence (if any) as may be gathered from the description contained in the court rolls, and a statutory declaration made in 1878 by Mr. E. who, for many years, collected the rents of the property as agent for Miss S. the trustee and, subject to a life estate, the then owner of the property [which statutory declaration satisfied the vendor when he purchased the estate in 1878].

Freeholds and copyholds mixed.

3. As to such of the lots as are stated in the particulars to be partly freehold and partly copyhold, the purchasers thereof shall not be entitled to have it shown how much of such lots respectively is freehold and how much copyhold, nor to have the freehold and copyhold parts respectively identified and distinguished, or the boundaries thereof respectively ascertained, nor to make any inquiry into or concerning the same.

3. Conveyance.

By trustees.

4. The vendors are trustees [executors, mortgagees], and will convey as trustees [personal representatives, mortgagees], and will not give any other covenant for title than that implied by their so conveying.

By liquidator.

5. The vendor is the liquidator of a company, and will only give the covenant against incumbrances implied by his conveying as trustee.

4. Title Deeds.

Title deeds retained by vendor.

6. The muniments of title [*or*, some of the muniments of title] relate as well to the hereditaments now offered for sale as to other hereditaments the property of the vendor, and shall be retained by the vendor, who will give the purchaser a statutory acknowledgment of the right to production and delivery of copies thereof, and a statutory undertaking for safe custody [*or*, but the vendor being a trustee will not give any undertaking or covenant for safe custody].

Sale in lots.

7. All muniments of title relating to more than one lot shall, after completion of the sale of all the lots having a common title, be handed over to the largest purchaser in value of such lots, and he shall give to the purchasers of the other lots having a common title a statutory acknowledgment of the right to production and delivery of copies of the muniments relating to such common title, and a statutory undertaking for safe custody, such acknowledgment and undertaking to be prepared by and at the expense of the purchasers requiring the same. Until the completion of the sale of all the lots having a common title, the vendor will retain the muniments relating to the common title, and the purchasers of the lots sold shall in the meantime be entitled at their own expense to the production and copies of such muniments, but not to any acknowledgment, undertaking, or covenant in that behalf. If the completion of the sale of any of the lots having such common title shall be delayed for more than one year from this sale, the vendor shall, at the request and expense of the purchasers of the lots sold, give the statutory acknowledgment and [*or*, but not the] undertaking above mentioned.

5. *Stamping, Registration, Legal Estates.*

8. No objection shall be made on account of any document dated prior to the 16th day of May, 1888, being unstamped or insufficiently stamped [*add, if true*, which however is not known to be the case], and any document dated as aforesaid which the purchaser shall require to be stamped or further stamped shall, if practicable, be so stamped by him, and at his expense. Stamping.

9. No objection shall be made on the ground of any document not being registered in the Middlesex registry, and if registration of an unregistered document cannot be effected, no objection shall be taken to the title on that account (nor shall the vendor be required to furnish the purchaser with the name of the heir of any testator whose will was not registered). Registration.

10. The purchaser shall not require any outstanding legal estate (if such there be, which the vendor does not believe) to be got in. Legal estate.

11. Every or any outstanding legal estate or term of years, or interest required by the purchaser to be got in, or conveyed, or assigned, or released, shall be got in, conveyed, assigned, or released at the expense of the purchaser. Legal estate.

6. *Particular Kinds of Property.*

(i.) *Leaseholds.*

12. The production of the receipt for the last payment of rent due under the lease under which the property is held shall be accepted as conclusive evidence that all the covenants contained in the said lease have been performed up to the day of actual completion of the purchase, or that all breaches (if any) have been waived. [*Add, if necessary*, No evidence shall be required that the person signing such receipt is entitled to the reversion expectant on the said lease.] Performance of covenants.

13. If both lots are sold at this sale to different purchasers, the vendor will grant an underlease to the purchaser of Lot 2 for the term stated in the particulars, less one day, and subject to the rent mentioned in the particulars, and will then assign to the purchaser of Lot 1 the premises comprised in the said lease of [*date*], subject to the said underlease of Lot 2. If either of the said lots shall not be sold at this sale, the vendor will grant an underlease of the lot sold to the purchaser thereof for the term stated in the particulars, less one day, and subject to the rent mentioned in the particulars. The underlease and a counterpart thereof shall be prepared by the vendor's solicitor at the expense of the purchaser, and shall be in the same form, and shall contain the same covenants, or as near thereto as the circumstances of the case will permit, as the said lease of [*date*]. The purchaser shall not be entitled to any apportionment of rent other than that made by the vendor, and in no case shall the purchasers be entitled to any cross-covenants or other remedies as between themselves, other than the covenants to be contained in the said underlease. Property held under one lease and sold in two lots.

14. The lease under which the property is held may be inspected at the office of the vendor's solicitors seven days prior to the day of sale, and will be produced at the sale. The purchasers shall be deemed to have bought with full notice of the contents of such Notice of contents of lease.

lease, notwithstanding any incomplete or incorrect description thereof in the particulars.

Lease lost.

15. The purchaser shall be satisfied with the recital of the lease contained in an indenture of assignment, dated, &c., without requiring production of the lease, or proof that it is lost, or a copy of the lease, or proof of its contents further than such recital affords.

(ii.) *Underlease.*

Performance of covenants.

16. The production of the receipt for the last payment of rent due under the indenture of underlease under which the property is held shall be accepted as conclusive evidence that all the covenants contained in the said underlease, and also in the superior lease, have been performed up to the day of actual completion of the purchase, or that all breaches, if any, have been waived, and that all rent due under the superior lease has been paid.

(iii.) *Land sold subject to Leases.*

Notice of leases.

17. The property is sold subject to the leases mentioned in the particulars, counterparts, or abstracts or copies of the counterparts, whereof may be inspected at the office [*continue as in No. 14*].

Prior leases not surrendered.

18. No objection or requisition shall be made with respect to any lease or tenancy prior to the subsisting lease dated , whether such prior lease or tenancy be mentioned in the abstract or not, but such prior lease or tenancy shall be assumed to have been effectually determined.

Lease subject to underlease.

19. The purchaser shall not make any objection or requisition in respect of the term purported to be granted by the said indenture of underlease being in excess of the term granted by the said indenture of lease, or in respect of any variance between the covenants and conditions of the said underlease and the covenants and conditions of the said lease. The said lease and counterpart of the said underlease or copies thereof can be inspected [*continue as in No. 14*].

(iv.) *Life Estates and Policies of Assurance.*

Completion.

20. The purchaser shall from the hour of sale bear the risk of the dropping of the life of the life-tenant, and on payment of the purchase-money shall be entitled to the rents and liable for any outgoings as from the time fixed for completion, and entitled to all advantages of the policy of assurance. The purchaser shall pay any premium which may become payable after the day of sale [*state in the particulars on what day the premium falls due*].

Validity of policy.

21. The purchaser shall accept the production of the receipt for the last premium payable on the policy as conclusive evidence that the policy is valid and subsisting.

(v.) *Contingent Remainder and Policy.*

Contingent remainder.

22. The purchaser shall bear the risk of the remainderman dying in the lifetime of the tenant for life [*or whatever the contingency may be*], and in case the remainderman shall so die before the completion of this sale, the purchaser shall nevertheless pay the purchase-money, and any interest payable under condition .

All advantages of the said contingent remainder and policy shall belong to the purchaser as from the hour of sale, and he shall pay any premium which may become payable on the said policy after the day of sale [*Add condition as to the validity of policy, No. 21, above.*]

(vi.) *Advowson.*

23. In case the present incumbent shall die, or relinquish or be deprived of the benefice, before the day fixed for the completion of the sale, the vendor will present [use his best endeavours to procure the presentation of] such duly qualified person as the purchaser, having accepted the title and paid the purchase-money, shall nominate. The purchaser shall bear the risk of the presentation devolving on the Crown in consequence of the incumbent being promoted to a bishopric, and shall not be entitled to any compensation therefor. Advowson.

24. The purchaser shall not require any proof of the correctness of the statement of the age and state of health of the present incumbent. Age of incumbent.

7. *Conditions as to Title.*

25. The purchaser shall assume that no wife or widow of any former owner is entitled to dower [or freebench], unless such wife or widow is mentioned in the abstract. Dower.

26. The vendor will not pay or provide for the succession duty (if any) payable on the deaths of the life-tenant and annuitant above referred to. Succession duty.

27. The purchaser shall assume that all legacies and annuities given by the will of X., who died in the year , have been duly paid or provided for, or have expired. Legacies and annuities.

28. Lots , and a portion of Lot , were, with other hereditaments, not the subject of this sale, charged by the will of A. B., proved in the year , with two annuities of 50*l.* per annum. One of such annuities ceased by reason of a devise to the annuitant of the hereditaments upon which the annuity was charged. Upon the purchase by the present vendor in the year , a bond of indemnity against any claim by the remaining annuitant was given to him. The vendor will assign such bond to the purchaser at the expense of the latter, and shall not be required to procure a release of the said annuity, or any evidence that it has expired. Annuity.

29. By an indenture dated , A. B. indemnified the then purchaser against certain fee farm rents charged (*inter alia*) on the hereditaments thereby conveyed. No claim has ever been made in respect of such fee farm rents on the property now offered for sale, and the purchaser shall not require any release or further indemnity in respect thereof. Fee farm rents.

30. The purchaser shall not require any other proof of the satisfaction of a mortgage dated than that afforded by the vendor's possession of the mortgage deed, and a statutory declaration by the vendor that the deed has been in his possession for years, and that he has never heard of any claim in respect of principal or interest under the said mortgage. Mortgage.

31. The purchaser shall assume that a sum of £ and interest intended to be secured by a conditional surrender dated , in respect whereof no claim has been made for years, has been Mortgage of copyholds.

- paid off or otherwise discharged, and shall not require the vendor to obtain any warrant of satisfaction thereof, or to enter any such warrant on the court rolls, nor shall the purchaser make any objection or requisition in respect of such conditional surrender.
- Mortgages to building societies.** 32. Where any mortgage has been made to a building society and there is a receipt for the mortgage debt endorsed on the mortgage deed purporting to be sealed with the society's seal and countersigned by the manager or secretary of the society, the purchaser shall assume that the seal was properly affixed and that the person signing as manager or secretary was at the time of signing duly appointed manager or secretary of the society [*add, where necessary, "notwithstanding that at the date of such receipt the society was dissolved"*], and the purchaser shall not make any requisition or inquiry of the vendor or elsewhere in reference to the constitution of the society.
- Tithes.** 33. The purchaser shall not require any proof that the property is tithe-free other than a statutory declaration by A. B. that he has occupied the property for the last years, and that no claim has ever been made on him for tithes, tithe rent-charge, or other payment in lieu of tithes.
- Restrictive covenants.** 34. The property is part of a building estate and is subject to the covenants and conditions contained in a deed poll dated . A copy of this deed poll can be inspected by intending purchasers at the sale or days before the sale at the office of the vendor's solicitor.
- Pedigree.** 35. The purchaser shall not require any other proof of the pedigree of X., a former owner of the property, or of the birth, marriage, or death of any person named in such pedigree, than a statutory declaration by A. B. a solicitor and friend of X.'s family, [which declaration satisfied the vendor on the occasion of his purchase in the year].
- Variation in name.** 36. The purchaser shall be satisfied with a statutory declaration (which satisfied the vendor when he purchased) by John William Smith, that he is the "John Smith," son of John Smith and Mary Brown named in Anna Brown's will, and identifying his certificate of birth.
- Will, proof of seisin.** 37. The title shall commence with the will of A. B. dated , and proved , and containing a general devise. The purchaser shall assume that the testator died seised in fee simple of the property now offered for sale. [*If the will was dated before 1838, say: "that the testator was seised in fee simple of the property now offered for sale at the date of his will and thenceforth up to his death."*]
- Will devising copyholds.** 38. The title shall commence with the will of A. B. proved , and containing a devise of all the testator's property in the parish of Q. The purchaser shall not require any other proof of the testator's seisin than is afforded by the entry on the court rolls of the admittance of X. as trustee of the will.
- Will (not proved) not affecting land.** 39. The whole of the property with the exception of Lot 1 passed to the vendor by virtue of a deed of gift, dated the 6th April, 1881, in which deed of gift Lot 1 was accidentally omitted, but the title will be confirmed by the heir-at-law of the donor, and inasmuch as such donor left a will purporting to deal with personal property only, which has never been proved in consequence of no personal

property having passed thereunder, each purchaser shall be satisfied with a statutory declaration to be made by the heir-at-law that no will, dealing with real property, was ever executed, and that whatever real property the said donor was possessed of and was not included in terms in the deed of gift passed to him as such heir-at-law, and each purchaser shall be precluded from requiring production of the said will, or the probate thereof, as evidence of the vendor's title, and shall accept the vendor's covenant of indemnity against any claim to dower which could be made by the donor's widow.

40. A. B., a late owner of the property, left several documents purporting to be wills or codicils which were pronounced against and set aside in 1885 by a judgment in the Probate Division in an action of *A. v. B.*, an abstract of which judgment shall be furnished to the purchaser. The purchaser shall accept the said judgment as conclusive, and shall not make any requisition or objection in respect of any of the said wills or codicils, or the constitution of the said action or any proceedings therein. The said A. B. also left a will, dated , which has at present neither been set aside nor admitted to probate, but is the subject of pending litigation in the Probate Division. The vendor is both devisee under such last-mentioned will, and heir-at-law of the testator, and the pending litigation was caused by disputes relating only to the testator's personal estate. The purchaser shall not make any requisition or objection in respect of the said will or pending litigation. The vendor, who is also the administrator *pendente lite* of the testator, will make a statutory declaration that, except as aforesaid, no will or codicil was found after A. B.'s death, and the purchaser shall require no further evidence that A. B. made no other will or codicil than those above referred to. Disputed will.

41. By indenture dated, &c., the property was demised for seven years from 29th September, 1884. An action to recover possession of the property was brought by the vendor in the Queen's Bench Division of the High Court of Justice in October, 1886, and on 6th January, 1887, an order was made that the action should be stayed upon the defendants, who were not the lessees but the actual occupiers, giving to the vendor possession of the premises, and upon the terms mentioned in the said order, and the lease of the premises was handed over to the vendor. The original writ and copy order can be seen at the office of the vendor's solicitors on any day previous to the day of sale. And the original lease will be handed to the purchaser on completion. The purchaser shall not be entitled to make any objection or requisition on the ground that there has been no surrender of the premises executed, or judgment for recovery of possession of the premises obtained, or in any way arising out of the said proceedings of which the purchaser shall be taken to have full notice. Ejectment by vendor of his lessees.

42. The title shall commence with an indenture dated 1888, wherein the earlier title commencing with the will dated, &c., of A. B. who died [*date*] is recited, and whereby it appears that the property was then sold under the direction of the Chancery Division of the High Court of Justice in an action for the administration of the trusts of the said will. Recent commencement of title.

43. The title shall consist of the deed of conveyance upon trust
w. Recent commencement of
D D

very complicated title.

for sale, dated 1888, and the recitals therein contained, and no purchaser shall be entitled to anything more except a copy of such deed and of the statutory declaration hereinafter mentioned. Inasmuch as the title is voluminous and complicated, a statutory declaration has been made by Mr. E. (a solicitor and one of the trustees for sale), who has for forty years been acquainted with the property and the administration of the trusts thereof. Such declaration verifies the recitals in the sale deed as true to the best of the knowledge and belief of the said Mr. E., and the application of the rents for forty years in accordance with the title deduced by the said recitals; and such declaration shall be accepted as an absolute and conclusive answer to all objections and requisitions whatever. Nevertheless any purchaser may for his satisfaction and at his own expense in all respects (including the vendor's expense of production) inspect such of the older title deeds as are in the possession of the vendors, but no requisition shall be founded thereon. The said statutory declaration or a copy may be seen seven days before or at the sale.

Short title on sale out of Court.

The vendors sell and will convey as devisees under the will of X., deceased, and no further evidence of their right to convey shall be required than an office copy of the chief clerk's certificate, dated , in an action of A. v. B., which certificate states (amongst other things) that the vendors are entitled to the property for an estate in fee simple free from incumbrances.

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